San Francisco
Law Library
436 CITY HALL

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.

No. 12572

United States
Court of Appeals
for the Ninth Circuit.

JOHN D. ROSS, Sheriff of Santa Barbara County, California,

Appellant,

vs.

SYLVESTER MIDDLEBROOKS, JR.,

Appellee.

Transcript of Record

Appeal from the United States District Court, Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12572

United States
Court of Appeals
for the Ninth Circuit.

JOHN D. ROSS, Sheriff of Santa Barbara County, California,

Appellant,

vs.

SYLVESTER MIDDLEBROOKS, JR.,

Appellee.

Transcript of Record

**Appeal from the United States District Court,
Southern District of California,
Central Division.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

DAVID S. LICKER,
District Attorney of the County of Santa Barbara,

VERN B. THOMAS,
Assistant District Attorney,
Courthouse,
Santa Barbara, Calif.

For Appellee:

LOREN MILLER, and
A. L. WIRIN,
257 S. Spring,
129 West 3rd St.
407 Stimson Bldg.
Los Angeles 13, Calif.

ELIZABETH MURRAY,
17 E. Carrillo,
Santa Barbara, Calif.

In the District Court of the United States of America, Southern District of California, Central Division.

No. 10586-C

PETITION FOR WRIT

In re:
APPLICATION OF SYLVESTER MIDDLEBROOKS, JR. FOR A WRIT OF HABEAS CORPUS.

To the Honorable Judges of the United States District Court, Southern District of Calilfornia, Central Division:

The petition of Attorney Ben Margolis on behalf of Sylvester Middlebrooks, Jr., respectfully shows:

I.

That the said Sylvester Middlebrooks, Jr., hereinafter referred to as Middlebrooks, is unlawfully imprisoned, detained and restrained of his liberty by the Sheriff of Santa Barbara County in the City of Santa Barbara, County of Santa Barbara, State of California, by virtue of a warrant for extradition signed by the Honorable Earl Warren as Governor of the State of California.

II.

That the said imprisonment, detention and restraint are illegal, and that the illegality thereof

consists in this, to wit: (1) The purported conviction and sentence upon which the said demand for extradition was based is void in that the said conviction [2*] was entered by the Superior Court of Bibb County, State of Georgia, at a time when the court did not have jurisdiction over the prisoner or to render a judgment against him because the court was not fully constituted and acted outside of and in excess of its jurisdiction in the following:

(a) That the said Middlebrooks, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, was denied counsel, a speedy trial, a fair trial, a public trial, or in fact any trial in that he was arrested at the age of seventeen in the month of June or July, 1934, and was held in the local jail without charges and without any legal counsel from the time of arrest until February 8, 1935, at which time the following took place: On the morning of February 8, 1935, the jailor told him to get ready for trial. About 15 or 20 minutes later he was taken by the jailor to the courtroom. When he arrived the only ones in the courtroom were the Judge of the Superior Court of Bibb County, W. A. Clell, and the sheriff of Bibb County, A. M. Stephensen. Immediately after he entered the courtroom, the said judge and sheriff began talking together in low tones and Middlebrooks could not hear what they were saying. After they had finished their conversation the said judge called Middlebrooks to the bench and said,

*** Page numbering appearing at top of page of original certified Transcript of Record.**

"Don't you know that you can't go around breaking the laws of Georgia." Middlebrooks protested that he had not broken any laws. The said judge said, "I could give you twenty (20) years on the 5 charges of burglary." Middlebrooks protested that he had already been tried for the same five charges and sent to the reformatory. He asked for a lawyer and a jury trial. The said judge became very angry and again said that he could sentence him (Middlebrooks) to five years of hard labor in the Georgia State penitentiary [3] on each count. The said judge then pronounced sentence of five years on Middlebrooks, one for each count. Middlebrooks was never served with nor were any charges whatsoever read to him.

(b) The judgment and sentence imposed by the State of Georgia on or about the 8th day of February, 1935, against Middlebrooks violated the due process clause of the Fourteenth Amendment in that it imposed upon Middlebrooks cruel and inhuman punishment; he was committed to a "chain gang" where in accordance with the practices theretofore and thereafter existing he and others who were and are so committed were the victims of cruel, barbaric and inhuman treatment at the hands of jailors in the following respects, among others: They were forced to work on the average of 16 to 18 hours each and every day with the exception of Sunday doing the most strenuous and heaviest type of manual labor such as breaking rocks with heavy sledge hammers

and lifting and carrying heavy articles, many times in very hot weather, without any rest period whatever except a short period for lunch, with the result that as high as twelve out of fourteen men on a single detail have collapsed and succumbed physically to the fiendish inhuman work pace set.

They were locked in the "bull pen," their quarters at all times except work hours, which quarters were unsanitary, inadequately sized for the number of men confined; it consisted of one room with the only toilet facilities being a large "oil" can located in a corner of their sleeping room, which can leaked causing urine with its reeking stench to run under the beds of men attempting to sleep; it was infested with rats, lice and vermin of all types. [4]

There was no recreation or religious services of any type offered to them. For the slightest failure or inability to maintain the inhuman work pace set forth above they were put in "stocks" as punishment; a stock is a frame of timber with holes in which the hands and feet are confined in a tortured position so as to temporarily cripple the men so confined; as a result, on removal they had to be dragged to the "bull pen" unable to walk and there to lay for a day or two receiving medical care only from inexperienced, uneducated fellow prisoners with no medical equipment. Middlebrooks saw a man actually die as a result of this medieval, fiendish torture process.

They were put unclothed in a "sweat box" as punishment; this torture chamber was about six

feet long and three feet wide with no light and no window; they were kept unclothed in this box for different periods up to two weeks in solitary confinement subsisting on a diet of bread and water with no one to talk to except themselves, and with only a bucket set in a corner as toilet facilities.

They were forced to wear stripes, heavy leg chains and on occasion "picts" which were iron bands put around their ankles of such a nature that if a prong on one leg would strike the other leg it would cause severe and disabling injury.

They were fed unhealthy, indigestible, half-cooked food that contained foreign matter such as rat's dung, dead cockroaches and other insects; the food was of such a nature that rats caught by the men and fried were preferable.

They were constantly verbally abused by their jailors' using terms such as "sonofabitch," "bastards" and other like terms.

Their guards carried guns and on many occasions threatened [5] death while pointing guns at them, with no provocation whatsoever and with the guards having knowledge that there would be no penalty assessed if he caused death to a prisoner. They were savagely beaten by sadistic guards on many occasions, the guards using wooden clubs and leather whips on their backs and legs causing bruises and cuts.

(2) That for this court to render a judgment that will allow the agents of the State of Georgia

to take Middlebrooks into custody would violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that this would constitute state action of the State of California and would directly cause his return to the State of Georgia to effectuate a sentence of cruel and inhuman punishment and a sentence void by reason of the denial of due process because of the facts hereinabove set forth and incorporated here by reference as if fully set forth; further, he would be in grave danger of violence and possible loss of his life at the hands of the officers and agents of the State of Georgia, for he, a Negro, has challenged the State of Georgia, its "chain gang" brutality which is permeated by hatred of the Negro, and its open, vicious and deadly programs of terrorism against the Negro citizen.

(3) The action of the Governor of the State of California in issuing the warrant of extradition, and officers of the Sheriff's Department of Santa Barbara, under said warrant, are contrary to the prohibitions of the Fourteenth Amendment to the Constitution of the United States, in that they are actions of the State in aid of a violation of constitutional rights guaranteed to Middlebrooks by the due process clause of the federal Constitution.

(4) That Middlebrooks' presence in the State of California is not due to his own voluntary act but to compulsion in that the United States Army transported him involuntarily to Camp Cooke in [6] California from another state.

(5) That Middlebrooks was once in jeopardy for the same crimes for which he was sentenced and convicted on or about the 8th day of February, 1935, in that on or about the 7th day of January, 1932, he was tried and convicted on the same charges that he was tried and convicted of on the 8th day of February, 1935.

(6) That prior applications for Writs of Habeas Corpus were made to the following California courts: the Superior Court, the District Court of Appeal, the Supreme Court; that each of these applications were denied.

(7) That an application for a stay of execution of the denial of Writ of Habeas Corpus and for a Stay of Execution of that portion of the Governor's warrant of arrest authorizing the turning over of the said Middlebrooks to the duly authorized agents of the State of Georgia was made to the Supreme Court of California and the Supreme Court of the United States for the purpose of allowing counsel for the said Middlebrooks to file a Petition for Writ of Certiorari to the Supreme Court of the United States; that each of these applications was denied.

Wherefore, your petitioner prays that a Writ of Habeas Corpus may be granted, directed to the said Sheriff of Santa Barbara County, commanding him to have the body of Sylvester Middlebrooks, Jr., before this Honorable Court at a time and place therein to be specified, to do and receive what there shall

be considered by this Honorable Court concerning said Sylvester Middlebrooks, Jr., together with the time and cause of his detention, and said Writ; and that he, the said Sylvester Middlebrooks, Jr., may be restored to his liberty.

Dated: November 21, 1949.

/s/ BEN MARGOLIS,
Petitioner on behalf of Sylvester Middlebrooks, Jr.
[7]

Duly verified.

[Endorsed]: Filed Nov. 21, 1949. [8]

[Title of District Court and Cause.]

No. 10586-C

ORDER FOR ISSUANCE OF WRIT OF HABEAS CORPUS

Upon reading the verified petition of Ben Margolis, Esquire, in the above-entitled matter, and good cause appearing therefor, it is the order of this Court that the Clerk is hereby ordered and directed to issue a Writ of Habeas Corpus directed to the Sheriff of the County of Santa Barbara, State of California, commanding him to produce the body of Sylvester Middlebrooks, Jr., on the 13th day of December, 1949, at the hour of 10 o'clock, a. m., of said date in the court room of Judge Carter, Federal Bldg., Los Angeles, Calif. to do and receive then and there what there shall be considered concerning said Sylvester Middlebrooks, Jr.

Dated: This 22 day of November, 1949.

/s/ JAMES M. CARTER,
District Judge.

[Endorsed]: Filed Nov. 2, 1949. [9]

United States District Court, Central Division, Southern District of California.

HABEAS CORPUS

The President of the United States of America

To Sheriff of the County of Santa Barbara, Greeting:

You are hereby commanded, that the body of Sylvester Middlebrooks, Jr. by you restrained of his liberty, as it is said detained by whatsoever names the said Sylvester Middlebrooks, Jr. may be detained, together with the day and cause of his being taken and detained, you have before the Honorable James M. Carter, Judge of the United States District Court in and for the Southern District of California, at the court room of said Court, in the City of Los Angeles, at 10 o'clock a. m., on the 13th day of December, 1949, then and there to do, submit to and receive whatsoever the said Judge shall then and there consider in that behalf; and have you then and there this writ.

Witness the Honorable James M. Carter, United States District Judge at Los Angeles, California this 22 day of November, A. D. 1949.

EDMUND L. SMITH,
Clerk.

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: Filed Dec. 20, 1949. [10]

[Title of District Court and Cause.]

Return by John D. Ross, Sheriff of Santa Barbara County, California.

To the Honorable James M. Carter, Judge of the United States District Court in and for the Southern District of California, Central Division:

In obedience to the writ of habeas corpus, hereto annexed, I do hereby certify and return to the Court as follows:

I.

That I am the duly elected and acting Sheriff of Santa Barbara County, California, and that before the said writ of habeas corpus was served upon and came to me, the said Sylvester Middlebrooks, Jr., also known as Sylvester Middlebrooks, was committed to my custody on the 21st day of September, 1949, and that he now is detained at the Santa Barbara County Jail by virtue of a certain governor's warrant issued by the Honorable Earl Warren, Governor of the State of California, a true photostatic copy of which warrant is hereto annexed and made a part hereof and marked Exhibit 1, the original of which I also produce. [12]

II.

That I, John D. Ross, Sheriff of Santa Barbara County, California, do make the further return and allege that I am informed and upon such information and belief, allege that the aforementioned war-

rant of the Governor of California, referred to as Exhibit 1, was issued pursuant to the receipt by the Governor of California of a written demand by the Honorable Herman E. Talmage, Governor of the State of Georgia, certified by him as authentic, for the extradition of Sylvester Middlebrooks, Jr. as a fugitive from justice from the State of Georgia, and also the receipt from the Governor of the State of Georgia, certified by him as authentic, of accompanying written documents, including indictment, judgment of conviction against Sylvester Middlebrooks, Jr., and other supporting papers, a true photostatic copy of such demand and accompanying written documents being annexed hereto and made a part of this return and marked Exhibit 2.

III.

That I, John D. Ross, Sheriff of Santa Barbara County, California, do make the further return and allege that I have no information or belief on the subject sufficient to enable me to answer the allegations of Paragraphs I, II (1), (a), (b), (2), (3), (4), (5), and (7) of the petition for a writ and placing my denials on that ground, deny, generally and specifically, each and every allegation in said paragraphs contained.

IV.

That I, John D. Ross, Sheriff of Santa Barbara County, California, do make the further return that the petition for a writ does not state facts sufficient to constitute a cause of action against this respon-

dent. Your attention is respectfully directed to the Memorandum of Points and Authorities in Opposition to the Petition for Writ of Habeas Corpus filed on behalf of respondent with respect to the points of law involved. [13]

Dated this 16th day of December, 1949.

/s/ JOHN D. ROSS,
Sheriff of Santa Barbara
County, California.

Duly verified.

EXHIBIT 1

State of California
Executive Department

The People of the State of California, to any Sheriff, Constable, Marshal, or Policeman of this State, Greeting:

Whereas, it has been represented to me by the Governor of the State of Georgia that Sylvester Middlebrooks stand — charged with the crime of burglary (5 counts) committed in the County of Bibb, in said State, and that he fled from the justice of that State, and has taken refuge in the State of California, and the said Governor of Georgia having, in pursuance of the Constitution and Laws of the United States, demanded of me that I shall cause the said Sylvester Middlebrooks to be arrested and delivered to C. J. Sorrells and/or L. W. Howard and/or S. W. Roper, who is authorized to receive

him into his custody and convey him back to the said State of Georgia, and whereas, the said representation and demand is accompanied by a copy of indictment and supporting papers certified by the Governor of the State of Georgia to be authentic, whereby the said Sylvester Middlebrooks is charged with said crime; and it satisfactorily appearing that the representations of said Governor are true, and that said Sylvester Middlebrooks is a fugitive from the justice of the aforesaid State, you are, therefore, required to arrest and secure the said Sylvester Middlebrooks wherever he may be found within this State, and to deliver him into the custody of said C. J. Sorrells and/or L. W. Howard and/or S. W. Roper, to be taken back to the State from which he fled, pursuant to the said requisition, he, the said C. J. Sorrells and/or L. W. Howard and/or S. W. Roper, defraying all costs and expenses incurred in the arrest and securing of the said fugitive.

In witness whereof, I have hereunto set my hand and caused the Great Seal of the State to be affixed, this the 13th day of September, in the year of our Lord one thousand nine hundred and Forty-nine.

/s/ Earl Warren,
Governor of the State of California.

By the Governor:

[Seal] /s/ FRANK W. JUDSON,
Secretary of the State of California.

By /s/ CHAS. J. JAGERT,
Deputy Secretary of State.

EXHIBIT 2

The State of Georgia

Executive Department

The Governor of the State of Georgia

To His Excellency, the Governor of California:

Whereas, it appears by the annexed documents, which are hereby certified to be authentic, that Sylvester Middlebrooks stands charged with the crime of Burglary (5 counts) committed in the County of Bibb in this State, and it has been represented to me that said Fugitive from Justice has fled from the justice of this State, and has taken refuge in the State aforesaid;

Now, therefore, pursuant to the provision of the Constitution and Laws of the United States, in such cases made and provided, I do hereby request that the said Fugitive from Justice be apprehended and delivered to C. J. Sorrells and/or L. W. Howard and/or S. W. Roper, who is hereby authorized to receive and convey the said Fugitive from justice to the State of Georgia, there to be dealt with according to law.

In testimony whereof, I have hereunto set my hand, and caused the Great Seal of State to be affixed, at the Capitol in the city of Atlanta, this 23rd day of February A. D., 1949, and of the Inde-

pendence of the United States of America, the One Hundred and Seventy-three.

By the Governor:

/s/ HERMAN E. TALMADGE,
Governor.

[Seal] /s/ BEN W. FORTSON,
Secretary of State.

State Board of Corrections
Atlanta, Georgia

February 23, 1949

To His Excellency, Herman Talmadge, Governor.

Sir:

The petition of the State Board of Corrections, by its Chief Clerk, Robert J. Carter shows as follows:

That Sylvester Middlebrooks was convicted at the February (1935) term(s), Bibb County Superior Court(s), State of Georgia, a Court (or Courts) having jurisdiction thereof, of Burglary (5 counts) and was sentenced thereupon by the Hon. W. A. McClellan, Judge presiding, to One to One year in each of Five (5) Counts, one to follow the other in the penitentiary of Georgia.

By virtue of said sentence(s) the said Sylvester Middlebrooks was received in the penitentiary February 8th, 1935 and while confined in said penitentiary escaped from Walton County Public Works Camp, Monroe, Georgia, a branch of the Georgia penitentiary, on July 13, 1939 and fled the State and is now a fugitive from justice and has been recaptured and is being held by Police Department, Camp Cooke, California under the name of Sylvester Middlebrooks.

Copies of the original indictment(s) and sentence(s) of the said Sylvester Middlebrooks are hereto attached.

Your petitioners further show that the said Sylvester Middlebrooks is not wanted in this State for the purpose of collecting a debt, nor for any private purpose whatsoever, but solely that he may brought back and again confined in the Georgia penitentiary to complete the terms of his sentences as imposed by the presiding Judge, and the ends of justice require that he be returned.

Wherefore, your petitioners pray that requisition may be issued upon His Excellency the Governor of California for a warrant of extradition that the said Sylvester Middlebrooks may be returned to the State of Georgia, and that C. J. Sorrells and/or L. W. Howard and/or S. W. Roper be appointed agent of this State for the purpose of bringing back the said Sylvester Middlebrooks that he may be again confined in the Georgia Penitentiary.

Respectfully submitted,
State Board of Corrections,

/s/ ROBERT J. CARTER,
Chief Clerk.

Sworn to and subscribed before me this 23rd day of February, 1949.

/s/ J. L. GRIFFITH,
Notary Public, Georgia, State at Large.

My commission expires 2-24-49.

Georgia, Fulton County—ss.

I, R. E. Warren director of the State Board of Corrections, certify over my official hand and seal that Robert J. Carter is the duly appointed and acting chief clerk of the State Board of Corrections and is in charge of the records of said body, and that he as such chief clerk has the right to sign applications for the extradition of prisoners who are wanted by the State of Georgia for escape.

Witness my hand and official signature this the 23rd day of February 1949.

/s/ R. E. WARREN,
Director, State Board of
Corrections.

Georgia, Fulton County—ss.

I, Robert J. Carter do certify that I am the duly appointed and acting chief clerk of the State Board of Corrections, and that the above attestation subscribed to by R. E. Warren as director of said board is sufficient and in due form of law, and that his signature thereto is genuine.

Witness my hand and official signature, this the 23rd day of February, 1949.

/s/ ROBERT J. CARTER,
Chief Clerk, State Board of
Corrections.

Georgia, Fulton County—ss.

I, Ben W. Fortson, Jr. secretary of state for the State of Georgia, I do hereby certify that the attestations, subscribed to by R. E. Warren as director of the State Board of Corrections, and Robert J. Carter as chief clerk of the State Board of Corrections, are sufficient and in due form and, therefore, all due faith, credit and authority is and ought to be had and given to these attestants as such.

In testimony whereof, I have here unto set my hand and affixed the seal of my office, at the capitol in the city of Atlanta, this 23rd day of February, in the year of our Lord, one thousand nine hundred and forty-nine, and of the independence of the United States of America the one hundred and seventy-second.

[Seal] /s/ BEN W. FORTSON, JR.,
Secretary of State.

INDICTMENT

No. 8-A

State of Georgia, Bibb County.

The Grand Jurors, selected, chosen and sworn for the County of Bibb to-wit:

1. C. L. Bowden, Foreman. Excused
2. Louis Funkenstein
3. R. R. Barrow
4. David S. Jones

5. John E. Wilson
6. J. Warren Timmerman. Excused
7. M. E. Everett. Excused
8. F. R. Happ. Excused
9. E. L. Cox
10. Geo. W. Alexander
11. Julian S. Lewis
12. L. A. Shirley
13. R. Fleming Johnson
14. H. N. Mitchell
15. W. F. Houser
16. C. W. Buchanan
17. C. A. Harris
18. S. R. Shi, excused.
19. McD. Nisbet
20. S. S. Chandler
21. A. B. Lee
22. H. G. Hollingsworth
23. J. T. McGehee

in the name and behalf of the citizens of Georgia, charge and accuse Sylvester Middlebrooks, Jr., hereinafter referred to as the accused, of the County and State aforesaid, with the offense of Burglary.

For that the said accused on the 14th day of September, in the year Nineteen Hundred and Thirty One, in the County aforesaid did then and there unlawfully and with force and arms feloniously break and enter into the dwelling house of A. W. McClure with intent to commit a larceny, and after so breaking and entering, did then and therein, unlawfully,

privately, wrongfully, and fraudently take and carry away therefrom with intent to steal the same, two lady's solitaire diamond rings, one lady's wedding ring, one lady's open face gold watch, and one lady's hunting case watch and one lady's diamond studded brooch, all of the value of $800.00, and of the personal goods of Mrs. A. W. McClure, contrary to the laws of said State, the good order, peace and dignity thereof.

Second Count: And the Grand Jurors aforesaid, upon their oaths aforesaid, further charge and accuse the said Sylvester Middlebrooks, Jr., with having omitted the offense of burglary; for that the said Sylvester Middlebrooks, Jr., in the County and State aforesaid, on the 14th day of July, 1932, did then and there unlawfully and with force and arms, feloniously break and enter into the dwelling house of James A. Smith, with intent to commit a larceny, and after so breaking and entering, did then and therein unlawfully, privately, wrongfully and fraudulently take and carry away therefrom, with the intent to steal the same, four lady's dresses, one string imitation pearl beads, and one lady's wrist watch, all of the value of $25.00, and of the personal goods of Mrs. James A. Smith, contrary to the law of said State, the peace, good order and dignity thereof.

Third Count: And the Grand Jurors aforesaid, upon their oaths aforesaid, further charge and accuse the said Sylvester Middlebrooks, of the of-

fense of burglary; for that the said accused, in the county and State aforesaid, on the 10th day of July, 1932, did then and there unlawfully and with force and arms feloniously break and enter into the dwelling of Clifford McKay, with intent to commit a larcency, and after so breaking and entering, did then and therein unlawfully, privately, wrongfully and fraudulently take and carry away therefrom with intent to steal the same one double barrel shot gun, one 45 calibre automatic pistol, one lady's size hunting case watch, and one Gibson Mandolyn with case, all of the value of $200.00, and of the personal goods of Clifford McKay, contrary to the laws of said State, the good order, peace and dignity thereof.

Fourth Count: And the Grand Jurors aforesaid, upon their oaths aforesaid, further charge and accuse the said Sylvester Middlebrooks, Jr., with having committed the offense of burglary; for that the said accused on the 15th day of July, 1932, in the County and State aforesaid, did then and there unlawfully and with force and arms, feloniously break and enter into the dwelling house of W. A. Bishop, with the intent to commit a larceny, and after so breaking and entering, did then and therein unlawfully, privately, wrongfully and fraudulently take and carry away therefrom, with intent to steal the same, one cameo pin, one gentleman's black cameo ring, one 32 calibre Smith & Wesson pistol, of the value of $25.00, and of the personal goods of W. A. Bishop, also four dozen men's hats of the value of

$75.00, and of the personal goods of Swann-Abram Hat Company, contrary to the laws of said State, the good order, peace and dignity thereof.

Fifth Count: And the Grand Jurors aforesaid, upon their oaths aforesaid, further charge and accuse the said Sylvester Middlebrooks, Jr., with the offense of burglary; for that the said accused on the 15th day of August, 1932, in the County and State aforesaid, did then and there unlawfully and with force and arms, feloniously break and enter into the dwelling house of J. A. Hunt, with the intent to commit a larceny, and after so breaking and entering did then and therein unlawfully, privately, wrongfully and fraudulently take and carry away therefrom, with intent to steal the same one 38 calibre pistol, and one small toy cash register, and one check protector machine, all of the value of $50.00, and of the personal goods of J. A. Hunt, contrary to the laws of said State, the good order, peace and dignity thereof.

Bibb Superior Court, November Term, 1934.

/s/ CHARLES H. GARRETT,
Solicitor General.

/s/ A. W. McCLURE,
Prosecutor.

BIBB

Superior Court
N W Term, 1934

THE STATE,

vs.

SYLVESTER MIDDLEBROOKS, JR.,
Burglary

True Bill,

JOHN E. WILSON,
Foreman.

CHAS. H. GARRETT,
Solicitor General.

A. W. McCLURE,
Prosecutor.

Witnesses:

A. W. McCLURE,
Mulberry St.

CLIFFORD McKAY,
Letter Shop.

J. A. HUNT,
220 Macon St.
(Georgia Place)

JAS. A. SMITH,
Elberta, Ga.

W. A. BISHOP,
624 Ingleside Ave.

LANEY BROWN,
c/o Amos Wilder,
Hawkins Ave.

AMOS WILDER,
Hawkins Ave.

BROTHER SIMMONS,
Roy St.

CALVIN FLEMING,
Bartlett's Crossing.

OFF. STEVENS.

The Defendant waiver being formally arraigned, and pleads not guilty under each of the counts of the indictment. This Feb. 8th, 1935.

/s/ CHAS. H. GARRETT,
Sol. Gen.

Copy of the Bill of Indictment and List of Witnesses, sworn before the Grand Jury, waived before arraignment.

....,
Defendant's Attorney.

State of Georgia,
County of Bibb;

Clerk's Office, Bibb Superior Court.

I, Romas Ed Raley, Clerk Bibb Superior Court, do certify that the foregoing 4 pages hereto attached contain a true and correct copy of the Indictment of Sylvester Middlebrooks, Jr., just as same appears of file and record in this office.

In Witness Whereof, I have hereunto set my hand and affixed my seal, this 28th day of January, 1949.

[Seal] /s/ ROMAS ED RALEY,
Clerk, Bibb Superior Court.

[Stamped] State Board of Correction, Jan. 31, 1949.

State of Georgia, Bibb County

In the Superior Court of Said County

No. 2191

THE STATE,

vs.

SYLVESTER MIDDLEBROOKS.

INDICTMENT FOR BURGLARY

Tried at February Term, 1935, and Plea of Guilty.

Whereupon, The Defendant being before the Bar

of this Court and showing no reason why the sentence of the Court should not be pronounced,

It Is Considered Ordered and Adjudged by the Court:

That you, Sylvester Middlebrooks, the defendant in the above-stated case, be taken from the Bar of this Court to the Jail of Said County, where you shall be safely kept until demanded by a guard to be sent from the Penitentiary of this State for the purpose of conveying you to said Penitentiary, to whom you shall be delivered, and by such guard you shall be safely conveyed to the Penitentiary of this State, or such other place or places as the Governor or Prison Commission of the State of Georgia may direct, and be punished by confinement and labor in said Penitentiary, or other place or places as may be directed as aforesaid, for not less than One year, and for not more than One year, to be computed from this date, provided you remain in jail and do not file any motion or other proceeding to interfere with the operation of this Sentence; in case any such motion of other proceeding is filed, and you remain in jail pending the same, this sentence will be computed from the final disposition of the same; in case supersedeas bond is furnished, this sentence will be computed from the time you return to custody after a final disposition of all pending matters affecting the execution of this sentence.

It Is Further Ordered, That the Clerk of this Courtnotify the Prison Commission of the State of

Georgia of your conviction and sentence, as required by law.

In Open Court, this 8th day of February, 1935.

W. A. McCLELLAN,
Judge S. C. M. C.

Georgia,
Bibb County,

Clerk's Office, Superior Court.

I Hereby Certify, That the foregoing is a true copy of the sentence passed in the above-stated case as the same appears from the record of file in said court.

Witness my Official Signature and the Seal of said Court, this 28th day of January, 1949.

[Seal] /s/ ROMAS ED RALEY,
Clerk of Superior Court,
Bibb County, Ga.

State of Georgia, Bibb County
In the Superior Court of Said County

No. 2191

THE STATE,

vs.

SYLVESTER MIDDLEBROOKS.

INDICTMENT FOR BURGLARY

Tried at February Term, 1935, and Plea of Guilty as to Count 5 of said indictment,

Whereupon, The Defendant being before the Bar of this Court and showing no reason why the sentence of the Court should not be pronounced,

It Is Considered Ordered and Adjudged by the Court:

That you, Sylvester Middlebrooks, the defendant in the above-stated case, be taken from the Bar of this Court to the Jail of Said County, where you shall be safely kept until demanded by a guard to be sent from the Penitentiary of this State for the purpose of conveying you to said Penitentiary, to whom you shall be delivered, and by such guard you shall be safely conveyed to the Penitentiary of this State, or such other place or places as the Governor or Prison Commission of the State of Georgia may direct, and be punished by confinement and labor in said Penitentiary, or other place or places as may be directed as aforesaid, for not less than One

year, and for not more than One year, to be computed after the expiration of the sentence in Count 4 of said indictment, from this date, provided you remain in jail and do not file any motion or other proceeding to interfere with the operation of this Sentence; in case any such motion or other proceeding is filed, and you remain in jail pending the same, this sentence will be computed from the final disposition of the same; in case supersedeas bond is furnished, this sentence will be computed from the time you return to custody after a final disposition of all pending matters affecting the execution of this sentence.

It Is Further Ordered, That the Clerk of this Court notify the Prison Commission of the State of Georgia of your conviction and sentence, as required by law.

In Open Court, this 8th day of February, 1935.

W. A. McCLELLAN,
Judge S. C. M. C.

Georgia,
Bibb County,

Clerk's Office, Superior Court.

I Hereby Certify, That the foregoing is a true copy of the sentence passed in the above-stated case as the same appears from the record of file in said court.

Witness my Official Signature and the Seal of said Court, this 28th day of January, 1949.

/s/ ROMAS ED RALEY,
Clerk Superior Court,
Bibb County, Ga.

Penitentiary Sentence

State of Georgia, Bibb County

In the Superior Court of Said County

No. 2191

THE STATE,

vs.

SYLVESTER MIDDLEBROOKS.

INDICTMENT FOR BURGLARY

Tried at February Term, 194.., and Plea of Guilty as to Count 4 of said indictment.

Whereupon, The Defendant being before the Bar of this Court and showing no reason why the sentence of the Court should not be pronounced,
It is Considered Ordered and Adjudged by the Court:

That you, Sylvester Middlebrooks, the defendant in the above-stated case, be taken from the Bar of this Court to the Jail of Said County, where you shall be safely kept until demanded by a guard to be sent from the Penitentiary of this State for the purpose of conveying you to said Penitentiary, to

whom you shall be delivered, and by such guard you shall be safely conveyed to the Penitentiary of this State, or such other place or places as the Governor or Prison Commission of the State of Georgia may direct, and be punished by confinement and labor in said Penitentiary, or other place or places as may be directed as aforesaid, for not less than One year, and for not more than One year, to be computed after the expiration of the sentence in Count 3 of said indictment, from this date, provided you remain in jail and do not file any motion or other proceeding to interfere with the operation of this Sentence; in case any such motion or other proceeding is filed, and you remain in jail pending the same, this sentence will be computed from the final disposition of the same; in case supersedeas bond is furnished, this sentence will be computed from the time you return to cutody after a final disposition of all pending matters affecting the execution of this sentence.

It is Further Ordered, That the Clerk of this Court notify the Prison Commission of the State of Georgia of your conviction and sentence, as required by law.

In Open Court, this 8th day of February, 1935.

W. A. McCLELLAN,
Judge S. C. M. C.

Georgia,
Bibb County,

Clerk's Office, Superior Court.

I Hereby Certify, That the foregoing is a true copy of the sentence passed in the above-stated case as the same appears from the record of file in said court.

Witness my Official Signature and Seal of said Court, this 28th day of January, 1949.

/s/ ROMAS ED RALEY,
Clerk Superior Court,
Bibb County, Ga.

State of Georgia, Bibb County
In the Superior Court of Said County

No. 2191

THE STATE,

vs.

SLYVESTER MIDDLEBROOKS.

INDICTMENT FOR BURGLARY

Tried at February Term, 1935, and Plea of Guilty as to Count 3 of said indictment,

Whereupon, The Defendant being before the Bar of this Court and showing no reason why the sentence of the Court should not be pronounced,

It Is Considered Ordered and Adjudged by the Court:

That you, Sylvester Middlebrooks, the defendant in the above-stated case, be taken from the Bar of this Court to the Jail of said County, where you shall be safely kept until demanded by a guard to be sent from the Penitentiary of this State for the purpose of conveying you to said Penitentiary, to whom you shall be delivered, and by such guard you shall be safely conveyed to the Penitentiary of this State, or such other place or places as the Governor or Prison Commission of the State of Georgia may direct, and be punished by confinement and labor in said Penitentiary, or other place or places as may be directed as aforesaid, for not less than One year, and for not more than One year, after the expiration of the sentence in Count 2 of said indictment, to be computed from this date, provided you remain in jail and do not file any motion or other proceeding to interfere with the operation of this Sentence; in case any such motion or other proceeding is filed, and you remain in jail pending the same, this sentence will be computed from the final disposition of the same; in case supersedeas bond is furnished, this sentence will be computed from the time you return to custody after a final disposition of all pending matters affecting the execution of this sentence.

It is Further Ordered, That the Clerk of this Court notify the Prison Commission of the State

of Georgia of your conviction and sentence, as required by law.

In Open Court, this 8th day of February, 1935.

W. A. McCLELLAN,
Judge S. C. M. C.

Georgia,
Bibb County,

Clerk's Office, Superior Court:

I Hereby Certify, That the foregoing is a true copy of the sentence passed in the above-stated case as the same appears from the record of file in said court.

Witness my Official Signature and the Seal of said Court, this 28th day of January, 1949.

/s/ ROMAS ED RALEY,
Clerk Superior Court,
Bibb County, Ga.

Penitentiary Sentence

State of Georgia, Bibb County
In the Superior Court of Said County

No. 2191

THE STATE,

vs.

SYLVESTER MIDDLEBROOKS.

INDICTMENT FOR BURGLARY

Tried at February Term, 1935, and Plea of Guilty as to Count 2 of said Indictment,

Whereupon, The Defendant being before the Bar of this Court and showing no reason why the sentence of the Court should not be pronounced,

It Is Considered Ordered and Adjudged by the Court:

That you, Sylvester Middlebrooks, the defendant in the above-stated case, be taken from the Bar of this Court to the Jail of said County, where you shall be safely kept until demanded by a guard to be sent from the Penitentiary of this State for the purpose of conveying you to said Penitentiary, to whom you shall be delivered, and by such guard you shall be safely conveyed to the Penitentiary of this State, or such other place or places as the Governor or Prison Commission of the State of Georgia may direct, and be punished by confinement and labor in said Penitentiary, or other place or places as may

be directed as aforesaid, for not less than One year, and for not more than One year, after the expiration of the sentence to Count 1 of said indictment, to be computed from this date, provided you remain in jail and do not file any motion or other proceeding to interfere with the operation of this Sentence; in case any such motion or other proceeding is filed, and you remain in jail pending the same, this sentence will be computed from the final disposition of the same; in case supersedeas bond is furnished, this sentence will be computed from the time you return to custody after a final disposition of all pending matters affecting the execution of this sentence.

It is Further Ordered, That the Clerk of this Court notify the Prison Commission of the State of Georgia of your conviction and sentence, as required by law.

In Open Court, this 8th day of February, 1935.

W. A. McCLELLAN,
Judge S. C. M. C.

Georgia,
Bibb County,

Clerk's Office, Superior Court:

I Hereby Certify, That the foregoing is a true copy of the sentence passed in the above-stated case as the same appears from the record of file in said court.

Witness my Official Signature and the Seal of said Court, this 28th day of January, 1949.

/s/ ROMAS ED RALEY,
Clerk Superior Court,
Bibb County, Ga.

REQUISITION

by the
Governor of Georgia

for
Sylvester Middlebrooks

Charged With
Burglary (5 counts)

Extradition Warrant Issued
.....19....

[Seal]

By HERBERT SIMMONS, JR.

Receipt of Copy Acknowledged.

[Endorsed]: Filed Dec. 20, 1949. [31]

At a stated term, to wit: The September Term, A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday, the 20th day of December, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable James M. Carter,
District Judge.

MINUTES OF DEC. 20, 1949

[Title of Cause.]

For hearing on return of Writ of Habeas Corpus, issued Nov. 22, 1949; John T. McTernan and Robert Simmons, Esqs., appearing as counsel for plaintiff; Vern Thomas, Deputy District Attorney, appearing as counsel for defendant; and both sides answering ready;

Attorney Thomas files Return to Writ and Points and Authorities.

On motion of Attorney Thomas it is ordered that Eugene Cook, Atty. Genl. of the State of Georgia, is admitted to appear herein as amicus curiae for the purpose of filing a brief only, said counsel not being personally present, and the brief of amicus curiae, received by mail by the Court, is now filed, pursuant to said order.

It is stipulated and ordered that the petition

herein be also deemed as a Traverse to the Return to Writ.

The petitioner is personally present and it ordered that the record so show. Attorney McTernan makes opening statement for the petitioner.

Attorney Thomas moves on behalf of respondent to discharge and dismiss the Writ on the ground that the petition and the opening statement of counsel for petitioner neither state facts sufficient to constitute a cause of action. Court orders said motion stand submitted and that hearing proceed. [32]

Attorney Thomas makes opening statement in behalf of respondent.

Sylvester Middlebrooks, Jr., petitioner herein, is called, sworn, and testifies in his own behalf.

Attorney Thomas, on behalf of respondent, objects to introduction of any evidence on the ground there is no cause of action, etc., and Court orders said motion submitted. Petitioner's Exhibits 1 and 2 are admitted in evidence.

At 11:05 a.m. court recesses. At 11:15 a.m. court reconvenes herein and all being present as before, including counsel for both sides, and the petitioner;

Sylvester Middlebrooks, Jr., petitioner herein, testifies further. Petitioner's Exhibits 3 to 7, inclusive, are admitted in evidence.

At noon court recesses to 1:30 p.m. At 1:30 p.m. court reconvenes herein and all being present as before, including counsel for both sides, and the petitioner; Sylvester Middlebrooks, Jr., testifies further and concludes his direct testimony.

Attorney Thomas moves to strike all testimony of Petitioner Middlebrooks and the said motion is taken under submission. There is no cross-examination.

Horace B. Conkle, witness for petitioner, is called, sworn, and testifies.

Attorney Thomas objects to any testimony being taken, renewing his previous similar motion, and ruling taken under submission, and Court orders that testimony proceed.

Elizabeth Murry, who is present, is ordered associated as co-counsel for petitioner, on motion of Attorney McTernan.

Attorney Thomas moves to strike the testimony of Witness Conkle and Court orders said motion taken under submission. There is no cross-examination. Petitioner's Exhibit 8 is marked for identification and offered in evidence, to which objection is made, and objection is sustained. At 2:30 p.m. court recesses.

At 2:40 p.m. court reconvenes herein and all being present as before, including counsel for both sides, and the petitioner;

Attorney McTernan reads an abstract of article into the record. Attorney Thomas moves to strike said matter from the record and Court orders said motion taken under submission. Both sides rest.

Court makes a statement and renders certain oral findings.

The case is re-opened and Respondent's Exhibit A is admitted in evidence, and it is stipulated and

ordered that Petitioner's Exhibit 9 is admitted in evidence, the said exhibit consisting of copies of the various petitions for Writs and Application for Stay presented to the various State courts, together with affidavits filed in support thereof, and that said exhibit may be delivered later to the clerk for so marking as Petitioner's Exhibit 9 in evidence. Both sides rest.

Attorney McTernan argues to the Court for petitioner. Attorney Thomas argues to the Court for respondent.

Court orders that the matter stand submitted upon filing of briefs 10x10x5, petitioner to open.

On motion of Attorney McTernan it is ordered that Lorrin Miller may appear as amicus curiae and file a brief, the Court stating, however, that it would prefer that the amicus curiae confine his briefing to collaboration with the petitioner in preparing his brief. [34]

In the United States District Court, Southern District of California, Central Division

No. 10586-C

In re:

APPLICATION OF SYLVESTER MIDDLEBROOKS, JR., FOR A WRIT OF HABEAS CORPUS

Appearances:

For Petitioner:

MARGOLIS & McTERNAN, and
HERBERT SIMMONS, JR.,
112 West 9th Street,
Los Angeles 15, California.

ELIZABETH MURRAY,
17 East Carillo Street,
Santa Barbara, California.

For Respondent:

DAVID S. LICKER,
District Attorney, Santa Barbara County,
Court House, Santa Barbara, California.

VERN B. THOMAS,
Asst. District Attorney, County of Santa Barbara,
Court House, Santa Barbara, California.

Amici Curiae:

LOREN MILLER,
129 West 3rd Street,
Los Angeles 13, California,
Attorney for National Association for the Advancement of Colored People.

EUGENE COOK,
Attorney General of the State of Georgia. [35]

OPINION

In this proceeding, Sylvester Middlebrooks, Jr., petitioned for a writ of habeas corpus, alleging that he was illegally held in custody by the Sheriff of Santa Barbara County, California, for extradition to the State of Georgia to there serve out the balance of a sentence imposed by a State court of Georgia; and that the custody of the California Sheriff was illegal, because:

(1) The conviction and sentence in the State of Georgia was void by reason of the failure of Middlebrooks to have counsel:

(2) There was actually no plea of guilty or trial before sentence;

(3) That the sentence and judgment of the State of Georgia violated the due process clause of the Fourteenth Amendment, in that it imposed upon Middlebrooks cruel and unusual punishment by the use of a chain gang;

(4) Other contentions not here pertinent.

The Sheriff of Santa Barbara county, John D. Ross, filed a return on the date of hearing, setting forth that he held custody of petitioner by virtue of a warrant issued by the Governor of the State of California, issued pursuant to a written demand for extradition by the Governor of the State of Georgia.[1]

By stipulation of the parties the petition for the writ was considered a traverse to the return. [36]

The petition for the writ further alleged that the petitioner had exhausted all his remedies in the State of California and in the Supreme Court of the United States by allegations that prior applications for writs of habeas corpus were made to the Superior Court, the District Court of Appeal, and the Supreme Court of the State of California, and that each of the applications was denied.

It alleged further that an application for a stay of execution was made to the Supreme Court of California, for the purpose of allowing counsel to petition the Supreme Court of the United States for a writ of certiorari, and that the same was denied.

Successive applications were made to Mr. Justice Douglas and Mr. Justice Black of the United States Supreme Court for a similar stay for the same

---

[1]The return attaches copy of the warrant issued by the Governor of California and copies of demand by the Governor of Georgia, together with the supporting copy of indictment from Bibb County, Georgia, and the sentence and commitment.

purpose, and were successively denied. It was conceded by the parties that these steps have been taken, and petitioner's exhibit 9 contains copies of the successive petitions for writs and for stay referred to above.

Petitioner complains of action of the State of California in apprehending and holding petitioner in custody on the ground that such state action is in violation of the Fourteenth Amendment of the Constitution of the United States, in that it deprives petitioner of due process of law on the grounds stated.

The Facts

Middlebrooks is a negro. Called as a witness, he testified he was born February 11, 1917, in Macon, Georgia. He left school at the age of 12 or 13 and never finished the third grade. In 1931, when 14 years of age, he was arrested for burglary, taken before a juvenile court and committed to [37] a reformatory, The Georgia Training School for Boys.

He spent about three months in the school, escaped, was re-arrested, sent again to the school, spent another five months and escaped again.

Middlebrooks was next arrested in June or July of 1934. He was then 17. He was held in jail, and in November, 1934, the grand jury of Bibb County, Georgia, returned an indictment charging him with five counts of burglary.[2]

---

[2]The similarity, in fact identity, of the names of the victims on petitioner's exhibit No. 1, having

He was held in custody until February 8, 1935, at which time he was sentenced to one year on each of the five counts of the burglary indictment, to run consecutively. It is this sentence which is the basis of the demand for extradition and the issuance of the warrant on which petitioner is now held.

Middlebrooks testified to the facts surrounding his alleged trial and sentence as follows: That on the morning of February 8, 1935, the jailer came to his cell and said, in substance, "Get ready for trial in 15 minutes"; that he was taken into the court room where the Sheriff and Judge were present; that up to that time he had not been informed of what he was charged, nor had any copy of the indictment been delivered to him; that the following then transpired: The Judge said, "Don't you know you can't go around breaking the laws of Georgia?" The petitioner denied that he had broken any laws and said he wanted a lawyer and a jury. The Judge said, in substance, "I could give you 20 years, instead I am going to give you 5 years." That he was then taken to jail and assigned to a chain gang in Walton County, near Monroe, [38] Georgia.

Petitioner's exhibit No. 2, the indictment, contains on the back thereof, the following language:

"The Defendant waives being formally ar-

---

reference to the juvenile offense, and the names of the victims in petitioner's exhibit No. 2, the indictment, show that the indictment was based upon the burglary acts committed when Middlebrooks was 14.

raigned, and pleads guilty under each of the counts of the indictment. This Feb. 8th, 1935.

Chas. H. Garrett—Sol. Gen.

"Copy of the Bill of Indictment and List of Witnesses, sworn before the Grand Jury, waived before arraignment.

. . . . . .

"Defendant's Attorney."

Nowhere else in the indictment form, nor in the sentence and commitment, is there any space for the name of an attorney for the defendant, nor does the name of an attorney appear anywhere therein.

Middlebrooks testified at length as to his experience on the chain gang in Walton County, Georgia. To summarize his extensive testimony briefly: 50 or 60 men were housed in one large room, 40 x 50 feet, with beds in tiers. No toilet facilities were available except large garbage cans which leaked badly and were emptied once a day. The prisoners worked from sun-up until sun-down, with a half hour off for lunch in winter and an hour off in summer time.

The food, and vermin and filthy substances contained therein, caused the prisoners to become sick with nausea and dysentery.

The prisoners were attended by guards armed with guns and sticks. The prisoners were often beaten and whipped. Double shackles were used, consisting of a band on each ankle and a chain 14 to 16 inches long in between. "Picts" were also

used, consisting of long points emanating horizontally from the band at the ankle. These were used if the prisoner [39] did not work sufficiently hard or if the guards thought he might attempt to run away.

"Stocks" were used. He described one in which he had been placed on six different occasions for approximately one hour each. The prisoner was seated on the narrow edge of a 2 x 4, his wrists and ankles placed through holes in the stock. His body thereby leaned forward at a 45 degree angle. A 2 x 4 was wired across his knees to keep them pressed down. When a prisoner was removed from the stocks, even after a one hour detention, he often was unable to walk and had to be dragged to the bull pen.

Sweat boxes were in use, consisting of small buildings 3 feet wide, 6 feet long, without light or heat. Often the prisoner was placed in the box without clothes, given two blankets, bread and water. The petitioner spent seven days in a sweat box.

Shackles were kept on at night, and the waist chains of the series of prisoners in one tier in the sleeping quarters would be threaded onto a long chain that ran the full length of the sleeping quarters, and the prisoners then kept in place by the locking of the long chain.

In addition, Middlebrooks related various individual acts of violence and brutaity, some of which

were directed towards him while other acts were directed against other prisoners.

After approximately two years he escaped and was brought back and served another year and thirteen days and escaped the second time. In April, 1942, he was inducted into the army and went AWOL in August, 1942. He was arrested by the Military and sentenced by Military court to fifteen years imprisonment, which was later commuted to a total of approximately three years and five months. [40]

At the time of his release from Military incarceration, he was in the State of California and was arrested by the Sheriff of Santa Barbara county, respondent herein, by virtue of a hold placed on him while in Military custody.

There was no cross-examination of Middlebrooks.

Horace Conkle, a resident of Santa Barbara county was called as a witness and described chain gangs in Colquett county, Georgia, in which he served following a conviction for burglary, in 1934. His testimony concerning housing, food, shackles, sweat box and whippings generally corroborated the petitioner's description. Conkle testified further that he was a visitor in Georgia in 1945 and 1946 and the chain gangs were still in operation, performing the same work with the same hours, using the same quarters. He saw shot guns and hickory sticks. He stated that two counties, Bibb and Muskogee, had adopted eight hour limits for work.

There was no cross-examination of Conkle.

No evidence was offered by respondent[3] except the certified copy of the Sheriff's return to the writ which had been filed in the Superior court of Santa Barbara county.

The respondent Sheriff asked dismissal of the petition for the writ on the grounds that it did not state sufficient facts to constitute a cause of action upon which relief could be granted and on lack of jurisdiction in the court. [41]

Similar objection was made to the opening statement of petitioner's counsel.

Objection was also made to the testimony of the petitioner and the witness Conkle, and motions were made to strike the testimony after it was given on the same grounds.

There was conflict on the issue of the alleged trial, between the record of the State court and the uncontradicted testimony of the petitioner. The

---

[3]This is significant, for the reason that petitioner made the same contentions in his petitions for writ, in the State courts that he made in the District Court, and was afforded a hearing by the Superior Court of Santa Barbara county. Respondent was therefore sufficiently informed prior to the trial in this court, of the nature of petitioner's contentions, to have presented contradictory evidence by way of affidavit or otherwise. In addition. the attorney general of the State of Georgia filed a brief on the law as amicus curiae. The court can assume he was therefore informed of the nature of the allegations in petitioner's petition for writ of habeas corpus, including the allegations of cruel and unusual punishment, of lack of counsel and of the alleged sentence without plea or trial.

court is not bound by the bare record. Upon application for a writ the court must inquire at petitioner's request into all facts going to:

> "* * * the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the state court to proceed to a judgment against him * * * it is open to the courts of the United States upon an application for a writ of habeas corpus to look beyond forms and inquire into the very substance of the matter * * *" Frank v. Magmum, 237 U.S. 309, 330-1; 59 L. Ed. 969, 981 (1915). See also Johnson v. Zerbst, 304 U.S. 458, 466-467, 82 L. Ed. 1461, 1467-1468 (1938); Waley v. Johnston, 316 U.S. 101, 104-5; 86 L. Ed. 1302, 1304; Mooney v. Holohan, 294 U.S. 103, 112, 115; 79 L. Ed. 791; 794, 795; Moore v. Dempsey, 261 U.S. 86, 91; 67 L. Ed. 543, 545; Parker, Limiting the Abuse of Habeas Corpus, 8 F.R.D. 171, 171-172.

The court finds that:

(1) Petitioner was not yet 18 at the time of his sentence on the indictment; that he had not finished the third [42] grade in grammar school and was generally ignorant and uneducated; that he was not given at any time, a copy of the charges against him; that he asked for an attorney but that one

was not assigned and that no attorney consulted with him or appeared for him; that the only unofficial person he saw while in jail, during the period of his arrest in June of 1934 until his sentence on February 8, 1935, was his mother.

(2) That the defendant was not afforded a trial or an arraignment, but instead was brought before the Judge and sentenced without having entered a plea of guilty, or without a trial having occurred.[4]

(3) The court found that the assignment to, and the work on the chain gang constituted cruel and unusual punishment and that this type of imprisonment was part of the penal system of the State of Georgia and incident to the sentence imposed upon the petitioner by the Georgia court.

The Questions Presented

(1) Was the failure to assign counsel, under the facts and circumstances and in light of petitioner's age, education and experience, a deprivation of due process of law?

(2) Was the sentence without plea or trial, namely the kangaroo court, a deprivation of due process of law?

---

[4]The court makes this finding for the following reasons: The court observed petitioner in court and was of the opinion that the petitioner spoke the truth; and for the reasons set forth in note [3] supra.

(3) Is cruel and unusual punishment, which is prohibited by the Eighth Amendment, included within the protection of the Fourteenth Amendment against State action?

(4) Assuming questions 1, 2 and 3 are answered in [43] the affirmative, does the action of the State of California, through the Sheriff of Santa Barbara county in arresting and detaining petitioner, constitute violation of the due process clause of the Fourteenth Amendment?

(5) Should relief be denied because of the Uniform Extradition Act of the State of California, § 1548.2 of the Penal Code of the State of California, and the Federal provisions, Art. IV, § 2, Clause 2 of the Constitution of the United States and the acts of Congress, regulating interstate extraditions, Title 18 U.S.C., § 3182.

(6) Has petitioner exhausted his remedies in the California courts so as to permit him to sue for relief in a Federal court?

(7) Must petitioner have also exhausted his remedies in the State of Georgia?

In addition to the novelty of the questions presented, the case has additional significance.

A vocal and disloyal political group in the country continually seizes upon alleged violation of rights of negroes, not for the purpose of honestly assisting the negro, but for the purpose of allowing this group to proclaim itself as the protector of

negro rights. Its object of course is to enlist the negro in its ranks and its disloyal cause.

Courts, and particularly Federal courts, should be ever ready to listen with a sympathetic and tolerant ear to persons who claim their constitutional rights have been abridged.

The untreated wound becomes an ulcer and the ignored grievance a cause. [44]

I.

The Failure to Afford Petitioner Counsel, Under the Particular Facts Involved, Constituted Denial of Due Process by the State of Georgia.

The Sixth Amendment to the Constitution of the United States, referring to the "assistance of counsel"[5] is a limitation on the power of the Federal government, and not the States. See Adamson v. California, 332 U.S. 46 (1947).

In Betts v. Brady, 316 U.S. 455 (1942), Mr. Justice Roberts, speaking for the Supreme court, said at p. 473:

"* * * the Fourteenth Amendment prohibits conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that

---

[5]Sixth Amendment: "In all criminal prosecutions the accused shall enjoy the right to * * * have the Assistance of Counsel for his defense."

the Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel."

The decision in each particular case will rest on the facts of that case. Wade v. Mayro, 334 U.S. 672 (1948) and Uveges v. Pennsylvania, 335 U.S. 437 (1948). Thus, although Mr. Justice Reed dissented in the Wade case,[6] he wrote the [45] opinion for the court in the Uveges case, and at page 440 he said:

"* * * Some members of the Court think that where serious offenses are charged, failure of a court to offer counsel in state criminal trials deprives an accused of rights under the Fourteenth Amendment. They are convinced that the services of counsel to protect the accused are guaranteed by the Constitution in every such instance. See Bute v. Illinois, 333 U.S. 640, dissent, 677-79. Only when the accused refuses counsel with an understanding of his rights can the court dispense with counsel. Others of us think that when a crime subject to capital punishment is not involved, each case depends on its own facts. See Betts v. Brady, 316 U.S. 455, 462. Where the gravity of the crime and other factors—such as the age and education of the

---

[6]Although the dissent hinges on Justice Reed's conclusion that State remedies were available (p. 697), note the references to petitioner's right and opportunity to secure counsel to review his alleged erroneous conviction (p. 697).

defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair, the latter group holds that the accused must have legal assistance under the Amendment whether he pleads guilty or elects to stand trial, whether he requests counsel or not. Only a waiver of counsel, understandingly made, justifies trial without [46] counsel.

"The philosophy behind both of these views is that the due process clause of the Fourteenth Amendment or the Fifth Amendment requires counsel for all persons charged with serious crimes, when necessary for their adequate defense, in order that such persons may be advised how to conduct their trials. The application of the rule varies as indicated in the preceding paragraph.

"Under either view of the requirements of due process, the facts in this case required the presence of counsel at petitioner's trail. He should not have been permitted to plead guilty without an offer of the advice of counsel in his situation. If the circumstances alleged in his petition are true, the accused was entitled to an adviser to help him handle his problems. Petitioner was young and inexperienced in the intricacies of criminal procedure when he pleaded guilty to crimes which carried a maximum sentence of eighty years. There is an undenied allegation that he was never advised of his right to

counsel. The record shows no attempt on the part of the court to make him understand the consequences of his plea * * *"

See Gibbs v. Burke, 337 U.S. 773 (1949) where the [47] failure of a State court to provide counsel for an adult (among other irregularities), was held a deprivation of due process.

The court said, p. 781:

"* * * This case is of the type referred to in Betts v. Brady, supra, at 473, as lacking fundamental fairness because neither counsel nor adequate judicial guidance or protection was furnished at the trial.

"A defendant who pleads not guilty and elects to go to trial is usually more in need of the assistance of a lawyer than is one who pleads guilty. The record in this case evidences petitioner's helplessness, without counsel and without more assistance from the judge, in defending himself against this charge of larceny. We take no note of the tone of the comments at the time of the sentence. The trial was over. The questionable issues allowed to pass unnoticed as to procedure, evidence, privilege, and instructions detailed in the first part of this opinion demonstrate to us that petitioner did not have a trial that measures up to the test of fairness prescribed by the Fourteenth Amendment."

In the case at bar, Middlebrooks was a negro boy, just under 18 years of age at the date of sentence.

He had not finished the third grade in school, and was held under arrest for a serious crime, burglary. He was not advised of the charge, nor given any copy of the indictment. He was advised [48] of the consequences, the penalties of the crime, but when he asked for a lawyer, his request was refused and he was sentenced.

Under these facts, it was a denial of due process under the Fourteenth Amendment for the State of Georgia to have failed to afford him counsel.

II.

The Sentence Imposed on Petitioner, Without the Entry of a Plea of Guilty, or Without a Trial First Had, Constituted a Violation of the Due Process Clause of the Fourteenth Amendment.

Having found petitioner's allegations true, there was obviously a denial of due process under the Fourteenth Amendment, where the state court sentenced in the absence of a plea of guilty or a trial and finding of guilt.

Simons v. United States, 119 F. 2d 539 (9th Cir. 1941), cert. denied, 314 U.S. 616 (1941), states at p. 544:

"* * * Due process of law in a criminal proceeding has been defined as consisting of 'a law creating or defining the offense, an impartial tribunal of competent jurisdiction, accusation in due form, notice and opportunity to defend, trial according to established procedure, and discharge unless found

guilty.' See 16 C.J.S., Constitutional Law, § 579, p. 1171, and cases cited * * *"

Hague v. C.I.O., 101 F. 2d 774 (3rd Cir. 1939), modified on other grounds, 307 U.S. 496 (1939), states at p. 781, 782:

"* * * An individual has a right to trial by properly constituted judicial authority upon a defined standard of criminal responsibility [49] set forth by statute or ordinance. He must have the opportunity to be heard and to call witnesses in his own defense. This is the very essence of due process of law as prescribed by the Fourteenth Amendment. Powell v. Alabama, 287 U.S. 45, 68, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527; Snyder v. Massachusetts, 291 U.S. 97, 122, 54 S. Ct. 330, 78 L. Ed. 674, 90 A.L.R. 575; United States v. Ballard, D.C., 12 F. Supp. 321, 325. * * *"

In Gibbs v. Burke, 337 U.S. 773 (1949) when defendant had a trial but no counsel, the court held it lacked "fundamental fairness." (p. 781.)

III.

The Punishment Inflicted by the State of Georgia Through Its Chain Gang Is a Deprivation of Due Process of Law, Contrary to the Fourteenth Amendment.

The Eighth Amendment to the Constitution prohibits cruel and unusual punishment. Like the Sixth Amendment, it is a limitation on the power

of the Federal government, and is not operative against State action.

There has been considerable discussion and much contention that the first eight Amendments have been included, in substance, by reference in the Fourteenth. But this question was squarely presented to the Supreme Court in a case involving the Fifth Amendment. [50]

In a landmark decision, the Court by a 5 to 4 decision, held to the contrary. Adamson v. California, 332 U.S. 46 (1947).[7]

However, in the language of Mr. Justice Frankfurter, concurring in Francis v. Resweber, 329 U.S. 459 (1947) at 468:

"In an impressive body of decisions [the Supreme Court] has decided that the Due Process Clause of the Fourteenth Amendment expresses a demand for civilized standards which are not defined by the specifically enumerated guarantees of the Bill of Rights. They neither contain the par-

---

[7]For an extensive discussion, see 2 Stanford Law Review 5, Does the Fourteenth Amendment Incorporate the bill of Rights? (1) The Original Understanding, by Charles Fairman (p. 5); (2) The Judicial Interpretation, by Stanley Morrison (p. 140). But see Wolf v. Colorado, 338 U.S. 25 (1949), wherein Mr. Justice Rutledge, dissenting sees an admission (p. 47) in the language of the majority (p. 27, 28) that the substance of the Fourth Amendment is "* * * implicit in the concept of ordered liberty," and thus, through the Fourteenth Amendment valid against the states.

ticularities of the first eight amendments, nor are they confined to them."

This language by Mr. Justice Frankfurter, concurring with the majority opinion in the above case, coupled with the dissent by Jutices Burton, Douglas, Murphy and Rutledge, indicates that Francis v. Resweber (supra) substantially holds that cruel and unusual punishment inflicted by a State is a deprivation of due process of law, contrary to the Fourteenth Amendment. It is true that the majority assumed, without so deciding, that a violation of the provisions of the Eighth [51] Amendment would be violative of the due process clause of the Fourteenth Amendment. This, of course, is not authority. Mr. Justice Reed, who wrote the majority opinion, however, observed later therein (p. 463):

"Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688. The identical words appear in our Eighth Amendment. The Fourteenth would prohibit by its due process clause, execution by a State in a cruel manner."

(Citing In re Kemmler, 136 U. S. 436 (1890 at 446.)

In Johnson v. Dye, 175 F. 2d 250 (3d Cir. 1949), rev'd. per curiam, 18 U.S.L. Week 3148 (1949), there was a square holding that the infliction of cruel and unusual punishment by a State was denial of due process of law contrary to the Four-

teenth Amendment. While this decision was reversed by the Supreme Court of the United States (18 LW 3148), the citation of Ex parte Hawks, 321 U. S. 114 (1944) in the reversal, indicates that the case was reversed because of the circuit's holding that State remedies need not be exhausted. The Supreme Court, contrary to its normal practice in such cases, took unusual care to indicate the grounds of the reversal by a citation of the Hawks case.[8]

We expressly rely upon the language of Chief Judge Biggs of the 3rd Circuit, in Johnson v. Dye, 175 F. 2d 250, (3rd Cir. 1949), at 255: [52]

"* * * But we entertain no doubt that the Fourteenth Amendment prohibits the infliction of cruel and unusual punishment by a state. State of La. ex rel. Francis v. Resweber, supra. Compare Weems v. United States, 217 U. S. 349, 30 S. Ct. 544, 54 L. Ed. 793, 19 Ann. Cas. 705; In re Kemmler, 136 U. S. 436, 447, 10 S. Ct. 930, 34 L. Ed. 519. We are of the opinion that the right to be free from cruel and unusual punishment at the hands of a State is as 'basic' and 'fundamental' a one as the right of freedom of speech or freedom of religion. And it should be pointed out that actions of the employees of the prison system of Georgia must be deemed to be those of the State of Georgia. The fact that a state officer acts illegally cannot

---

[8]This conclusion is also reached in the interpretation placed upon Johnson v. Dye, by 2 Stanford Law Review 174, 184 (Case of the Fugitive from the Chain Gang).

relieve a state of responsibility for his acts. Screws v. United States, 325 U. S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495, 162 A.L.R. 1330. * * *''

It follows that the action of the State of Georgia, in making use of the chain gang in carrying out the sentence imposed upon the petitioner, is denial of due process, violative of the Fourteenth Amendment. [53]

IV.

The Action of the State of California, Through the Sheriff of Santa Barbara County in Arresting the Petitioner and Holding Him in Custody for Extradition to the State of Georgia, in Order That He May Be Again ''Confined in the Georgia Penitentiary to Complete the Terms of His Sentence'' is Action Violative of the Due Process Clause of the Fourteenth Amendment.

Petitioner bases his case upon the contention that California action in arresting and holding the petitioner in custody, constitutes a violation of the due process clause of the Fourteenth Amendment.

California, through the respondent, the Sheriff of one of its political subdivisions, has arrested the petitioner upon a warrant issued by the Governor of California, and now holds him in custody. The Fourteenth Amendment protects against all State action by any of its officers, executive or judicial. (See Civil Rights cases, 109 U. S. 2, 11; 27 L. Ed. 835, 839 (1883). How can it be said that the action complained of is not State action by California?

California is a separate sovereignity. It acts,

through its Governor in issuing the warrant of arrest, on its own authority. Governors of States have refused to grant extradition and when a State refuses to grant the request of the demanding State no compulsion can be brought upon the State to honor the request.

Kentucky v. Dennison, 65 U. S. 66, 16 L. Ed. 717 (1860). Thus we have State action, based on independent decision and not mere mechanical causation.

California has taken this action pursuant to the provisions of Art. IV, Sec. 2, Clause 2 of the Constitution of the United States, and the act of Congress regulating interstate extradition, Title 18, U.S.C., §3182. California has further acted pursuant to the Uniform Extradition Act, a [54] statute of the State of California.

Section 1548.2 of the Penal Code of the State of California, one of the provisions of that act, provides for the form and prerequisite allegations for the demand for extradition.

Section 1549.2 of the Penal Code, another provision, provides that the Governor shall sign a warrant of arrest under the State Seal, directed to any peace officer in the State of California. Obviously, this is State action by California, regardless of the reasons therefor, or the validity thereof.

In fact, the respondent relies on these constitutional and statutory provisions to support his position.

The action of the State of California may be

ostensibly valid action, pursuant to the Federal Constitutional provision and pursuant to California statutes and at the same time be State action depriving petitioner of due process of law under the Fourteenth Amendment. This is true on two grounds:——

(1) The arrest and custody were ostensibly valid on the ground the petitioner was a fugitive from justice, who had escaped after a valid conviction and sentence, and that extradition had been demanded and petitioner arrested and held pursuant to a warrant from the Governor of California; but in view of the findings of this court, the Georgia conviction and sentence was void and of no legal effect because of the deprivation of counsel, and the mock trial to which petitioner was subjected. It follows, since the conviction is void, that California had no jurisdiction to arrest and has no jurisdiction to hold.

(2) The action of the State of California was requested by the State of Georgia for the purpose, as shown by the return of the respondent herein, "solely that he (the petitioner) [55] may be brought back and again confined in the Georgia penitentiary to complete the term of his sentence." It now appears that the portion of the sentence heretofore served, was on a chain gang; and this court is justified in concluding[9] that upon his return to Georgia,

[9]Note the words, "be brought back and again confined" in the Georgia demand.

petitioner would again be placed upon a chain gang.

California therefore, through the respondent, Sheriff, becomes an active participant in subjecting the petitioner to what this court has found to constitute cruel and unusual punishment, in violation of the Fourteenth Amendment. California becomes therefore an active participant in attempting to again subject this petitioner to such punishment. This is State action by California, in violation of the due process clause of the Fourteenth Amendment.

V.

Neither the Uniform Extradition Act of the State of California, Nor Article IV, §2, Clause 2 of the Constitution of the United States Nor the Acts of Congress, Regulating Interstate Extraditions, Prevail Over the Fourteenth Amendment.

The proposed rendition of the prisoner by California is pursuant to the compact to effect rendition of persons "charged in any State with Treason, Felony or other crime," contained in Art. IV, §2, Clause 2 of the U. S. Constitution. But Art. IV does not require rendition which violates the Fourteenth Amendment of the same Constitution. This disposes of the respondent's contention that to grant the release of petitioner under this writ, the court must hold unconstitutional the Uniform Extradition Act of the State of California. [56]

Statutes constitutional on their face may not be

used for unconstitutional purposes or with unconstitutional results.

See Yick Wo v. Hopkins, 118 U. S. 356; 373-374, 30 L. Ed. 220 (1886).

As we have stated herein action by a State in arresting and holding a prisoner for extradition, may be ostensibly lawful and then by the revelation and judicial finding of certain facts thereafter, may be determined to be unlawful custody, violative of the due process clause of the Fourteenth Amendment.

VI.

Petitioner Has Exhausted His Remedies in the State Court of California.

Petitioner has sought relief in the Superior, District Court of Appeal and the Supreme Court of the State of California.

In addition, he petitioned the Supreme Court of California for a stay in order that he might seek certiorari in the United States Supreme Court, but the stay was denied.

He has thus gone farther than the petitioner in Morgan v. Horrall, 175 F. 2d, 404 (1949).

There is was noted that Morgan (p. 407):

"* * * made no attempt to secure from a Justice of the California Supreme Court or from a Justice of the Supreme Court of the United States a stay of execution of the judgment of the State Courts—this for the purpose of securing allowance of a reasonable time in which to obtain a writ of cer-

tiorari from the Supreme Court of the United States. * * *'' [57]

Middlebrooks also petitioned two Justices of the United States Supreme Court for a stay for the same purpose.

The only step he has not taken was to have petitioned the Supreme Court of the United States for certiorari. The law does not require the making of a futile petition for certiorari. It requires only the exhaustion of meaningful remedies. Wade v. Mayo, 334 U. S. 672, 682 (1948). Without the stay the petitioner would have been removed from California before the petition could have been presented and the case would have been moot.

The petitioner took the required and logical steps and has exhausted his remedies in the California courts.

VII.

The Petitioner Need Not Have Exhausted His Remedies in the State of Georgia.

The three grounds which have been relied upon by petitioner for relief herein are, (1) the alleged failure to assign counsel; (2) the alleged mock trial, with absence of either a plea of guilty or a trial of the facts; (3) the alleged imposition of cruel and unusual punishment.

It is arguable that if petitioner returned to Georgia, he might be able to raise in the courts of Georgia, the first two points, and that a remedy would exist in that State, wherein he could have the

conviction and sentence set aside, have counsel appointed and have the benefit of either a plea of guilty or a trial. As a practical matter, it is extremely remote that any of this relief would be granted him. Respondent, in substance, urges that he be returned to Georgia and there seek this relief.

This is unrealistic reasoning. [58]

28 U.S.C., §2254, is headed, "State Custody. Remedies in State Court." It reads as follows:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

The section obviously contemplates a situation where the writ in the Federal court seeks the release of a prisoner held in a particular State's custody by virtue of a State court judgment in that State. The petitioner herein is held in custody in California by reason of the warrant for arrest issued by the Governor of the State of California

to return the petitioner to Georgia to complete the service of the Georgia sentence. The section does not by its language, answer our inquiry.[10] [59]

Moreover, no case has been called to our attention, nor can we find one where Title 28 U.S.C., §2254, or the principle therein codified has been relied upon in a habeas corpus proceeding to require the exhaustion of the remedies in the demanding State, as well as in the asylum State.

In Morgan v. Horrall, 175 F. 2d 404 (9th Cir. 1949), extradition was involved, wherein Colorado was demanding the prisoner. The Circuit affirmed the judgment on the ground that the petitioner had made no clear and convincing showing of violation of "rights under the Federal Constitution" (p. 407). As an additional ground the Circuit Court found that all available remedies in California had not been exhausted. Neither the Circuit or the District Court (78 Fed. Supp. 756) discussed or considered the question of exhausting State remedies in Colorado.

To sustain respondent's argument would require that a prisoner exhaust his remedies in every state in which a remedy was available, and in an extradi-

---

[10]The Reviser's Notes to 28 U.S.C., §2254, states: "This new section is declaratory of existing law as affirmed by the Supreme Court. (See Ex Parte Hawk, 1944, 64 S. Ct. 448, 321 U. S. 114, 88 L. Ed. 572."

See Young v. Ragen, 69 S. Ct. 1073, 1074, Note 1 to the same effect.

tion matter this would involve at least two states and possibly more.

But the argument is fallacious upon another ground. To sustain respondent's argument would require this District Court to close its eyes to the violation of Constitutional rights and basic liberties which have occurred, and to permit the return of the petitioner to the State of Georgia. If Constitutional rights and basic liberties are to be protected, they must be protected in the courts where the questions arise and when the questions arise, and the shunting of a case from one court to another should as far as possible, be avoided.

As to petitioner's ground (3) the imposition of cruel and unusual punishment, the answer is clearer. The use of the chain gang is a part of Georgia's penal system. A requirement that the petitioner exhaust in Georgia his remedy on [60] this particular point would be obviously an idle act, since the court can assume that the Georgia chain gangs are operated under and pursuant to Georgia law.[11]

The court is not unmindful of the large body of law holding in substance that lower Federal courts

---

[11]The supporting documents in the demand for extradition contain the application to the Governor of Georgia, executed by the Georgia State Board of Corrections. It reads in part: "* * * Sylvester Middlebrooks * * * While confined in said penitentiary escaped from Walton County Public Works Camp, Monroe, Georgia, a branch of the Georgia Penitentiary * * *"

should not consider an application for writ of habeas corpus, where petitioner is detained under State process, except in rare cases where exceptional circumstances of peculiar urgency are shown to exist. In re Anderson, 117 F. 2d 939 (9th Cir. 1941); Hawk v. Olson, 130 F. 2d 910 (8th Cir. 1942) (see cases collected at p. 911).

But in Ex Parte Hawk, 321 U. S. 114 (1944) at 117, in a per curiam decision, the court said:——

"* * * The statement that the writ is available in the federal courts only 'in rare cases' presenting 'exceptional circumstances of peculiar urgency,' often quoted from the opinion of this Court in United States ex rel. Kennedy v. Tyler, (269 U. S. 13, 17—19253 was made in a case in which the petitioner had not exhausted his state remedies and is inapplicable to one in which the petitioner has exhausted his state remedies, and in which he makes a substantial showing of a denial of federal right.

"Where the state courts have considered and adjudicated the merits of his contentions, [61] and this Court has either reviewed or declined to review the state court's decision, a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated. * * *"

A further result has grown up in the cases which is apparent to anyone making a study thereof; the rule of the exhaustion of remedies in the State has been supplemented by the further rule that once the remedies have been exhausted and the highest court

of the State has passed upon the problem, then Federal courts are reluctant to intervene because of comity and out of respect for State courts. Thus, there has been created an endless circle, which if followed to its logical conclusion would deny to a Federal District court the right to give relief for violations of basic constitutional rights.

The Supreme Court states in Ex parte Hawk, (supra) "a federal court will not ordinarily re-examine upon writ of habeas corpus, the questions thus adjudicated" [emphasis supplied].

The general rule rests upon the balance between the State and Federal powers and jurisdictions, and the niceties of the comities existing between these separate sovereignties. The observance of these niceties and the concern concerning comity must give way on the assertion and the finding of the violation of basic constitutional rights.

Such a violation constitutes an exceptional case. It is therefore important that the exception be recognized and that where basic constitutional rights and liberties have been violated, that Federal court should not refuse to grant relief. [62]

28 U.S.C., §2241, reads in part as follows:

"Power to grant writ * * * (c) The writ of habeas corpus shall not extend to a prisoner unless —(3) He is in custody in violation of the Constitution or laws or treaties of the United States."

It is patent that this petitioner is in custody in violation of the Constitution of the United States.

We hold therefore, that our duty is to entertain and grant his petition and not to require him to first exhaust remedies in the State of Georgia, as well as in the State of California.

JAMES M. CARTER,
United States District Judge.

[Endorsed]: Filed Feb. 3, 1950. [63]

At a stated term, to wit: The September Term, A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday, the 3rd day of February, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable James M. Carter,
District Judge.

[Title of Cause.]

MINUTES OF FEB. 3, 1950

On the matters heretofore submitted, the decision of the Court is as follows:

The motions of the respondent to dismiss and to strike evidence are denied. The objections of re-

spondent to the admission of evidence are overruled.

Decision for the petitioner, findings and judgment to be drawn and signed; counsel for petitioner to submit same within ten days.

The petitioner will be enlarged upon bond for appearance to answer the judgment of the Apellate Court, if appeal is taken. (Rule 29(c) Court of Appeals for the Ninth Circuit.)

Bond is fixed in the sum of $2,000.

If appeal is taken, certificate of probable cause under 28 U.S.C. 2253, will be issued.

Written opinion filed. [64]

[Title of District Court and Cause.]

ORDER FOR RELEASE OF PETITIONER

This Court, having determined to grant the petitioner's application for a writ of habeas corpus in accordance with its opinion filed on February 3, 1950, and having directed the submission of findings and judgment, and being fully advised in the premises,

Does hereby order as follows:

1. Petitioner shall be forthwith enlarged prior to the signing of findings and judgment, upon the posting of security in the sum of Two Thousand Dollars ($2,000.00) conditioned upon, (a) his return upon any order of this Court, (b) in the event

of an appeal from the judgment of this Court issuing the writ of habeas corpus, his return upon any order of the appellate court having jurisdiction of such appeal, (c) his remaining within the jurisdiction of this Court pending further order of this Court or order of the appellate court having jurisdiction of the aforesaid appeal, (d) in the event of the petitioner's default or contumacy with respect to the conditions herein set forth, said security shall be subject in all respects to the provisions of Rule 8 of this Court. [65]

2. At such time as the findings and judgment are signed herein and the writ of habeas corpus shall issue, the security posted pursuant to paragraph 1 of this Order shall be deemed posted for the purpose of, and shall be, the security required by the said writ.

3. In the event that no appeal shall be taken from the judgment herein within the time prescribed by law, then upon the expiration of said time petitioner shall be unconditionally released and the security posted pursuant to this Order shall be exonerated.

Dated at Los Angeles, California, this 7th day of February, 1950.

/s/ JAMES M. CARTER,
District Judge.

Judgment entered Feb. 8, 1950.

[Enclosed]: Filed Feb. 7, 1950.

At a stated term, to wit: The February Term. A. D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 5th day of April in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable: James M. Carter,
District Judge.

[Title of Cause]

MINUTES OF APRIL 5, 1950

On request of counsel for respondent, and good cause appearing, it is ordered that respondent have to, and including April 20, 1950, within which to file any objections he may have to the form of the findings and judgment proposed by petitioner.

At a stated term, to wit: The February Term. A. D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday, the 27th day of April, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable: James M. Carter, District Judge.

[Title of Cause.]

MINUTES OF APRIL 27, 1950

The Court having duly considered the proposed findings submitted by counsel for petitioner and the objections thereto filed by respondent, it is ordered that the objections are sustained in part and overruled in part, and it is ordered that counsel for petitioner re-draft the findings to conform to said rulings, within five days, the particulars of said changes having been stated orally by the Court to counsel for petitioner. [67]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on to be heard on the petition and the respondent's return, the parties having stipulated that the petition might be deemed to be the traverse to the return. Evidence was taken and argument, both oral and in the form of extensive briefs, was heard. Being fully advised in the premises the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Petitioner, Sylvester Middlebrooks, Jr. (hereafter called petitioner), is a Negro and a citizen of the United States, and formerly a resident of the State of Georgia.

2. Petitioner has been arrested and is being held in custody by respondent Sheriff of Santa Barbara County (hereafter called respondent) under and pursuant to a warrant of arrest issued by the Governor of California upon written requisition of the Governor of the State of Georgia, certified as authentic. This requisition was accompanied with a copy of an indictment charging petitioner with [88] the commission of five counts of burglary, a copy of the judgments of conviction and sentence of petitioner on each of five counts of burglary, each of which accompanying documents was certified as au-

thentic. Petitioner was apprehended and held for the purpose of delivering him to agents of the State of Georgia, by them to be conveyed to that State solely in order that he might be confined in a Georgia penitentiary to complete the terms of said sentence contained in said judgment made and entered in the Superior Court of Bibb County, State of Georgia, more particularly described below.

3. Petitioner was arrested in Bibb County, Georgia in June or July, 1934. At that time petitioner was seventeen years of age and had not finished the third grade of school. He was unfamiliar with both the substantive and procedural aspects of criminal law. Petitioner was held in jail continuously after his arrest, and in November, 1934, the grand jury of Bibb County, Georgia, returned an indictment charging petitioner with five counts of burglary, a felony punishable at that time in Georgia by a sentence up to twenty years in the penitentiary. This indictment was based upon acts allegedly committed by petitioner when he was fourteen years of age. Petitioner was never given or shown a copy of this indictment. Petitioner was brought to trial upon this indictment on February 8, 1935; he received fifteen minutes' notice of the trial by his jailor. At the time of trial petitioner asked for counsel. His request was ignored. Petitioner was not represented by, nor did he have the advice of counsel at or before the proceedings upon the indictment referrd to above before the Superior Court of Bibb County, Georgia, on February 8, 1935; and no counsel appeared on

behalf of petitioner at said proceedings. The said Superior Court refused or failed to afford counsel to petitioner upon his request.

4. At the proceedings upon the indictment before said Superior Court on February 8, 1935, petitioner was not arraigned. He did not enter a plea of guilty and there was no trial of issues [89] of fact before a judge or jury. Sentence was passed by the judge of the Superior Court fo Bibb County, Georgia, after petitioner had said that he had broken no laws and that he wanted a lawyer and a jury trial. Petitioner was sentenced to imprisonment in the penitentiary of Georgia for a period of one year on each of the five counts in the indictment, the sentences to run consecutively.

5. After his sentence petitioner was sent to the Walton County Public Works Camp of the State of Georgia, a branch of the penitentiary of that State. There petitioner was assigned to a chain gang and required to engage in painful labor under brutal and inhuman conditions. At all times while petitioner was confined to said public works camp he was required to wear an iron shackle on each ankle, connected by a heavy iron chain approximately sixteen inches in length. Picts, consisting of long metal points, were affixed horizontally from petitioner's ankle shackles. Petitioner was housed with fifty or sixty other prisoners in one large room approximately forty feet by fifty feet in size, with beds in tiers. No toilet facilities were available except a

large metal can which had no cover and which leaked badly, causing human excrement to be dispersed over large portions of the aforesaid room. This can was emptied once each day. Petitioner was required to work at hard and painful labor from sun-up until sundown each day, with one-half hour off for lunch in winter and one hour off in summer. Petitioner was attended by guards armed with guns and hickory clubs. Petitioner was often beaten and whipped. Petitioner was frequently confined in a stock. Petitioner was seated in said stock on the narrow edge of a two-by-four board with his wrists and ankles placed through holes in a board in front of him, causing his body to lean forward at a forty-five degree angle. Another two-by-four board was wired across his knees to force his legs to remain straight. When petitioner was removed from the stock he was unable to walk and had to be dragged to the living quarters above described. In said public works camp [90] petitioner was also frequently confined in a sweat box. This consisted of a small space three feet wide and six feet long, without light, heat or ventilation. When confined in the sweat box petitioner was deprived of clothing, given two blankets for covering and bread and water for food. Petitioner spent up to seven consecutive days in such a sweat box.

6. The conditions obtaining at the Walton CountyPublic Works Camp of the State of Georgia, set forth in paragraph 5 above, were of general application to persons confined upon conviction of fel-

ony and consisted of systematic, deliberate and methodical employment of aggravated brutality. The methods and practices set forth in paragraph 5 above were at all times herein material, and are, open, notorious and of long standing. This form of imprisonment and punishment was an integral part of the penal system of the State of Georgia at the time that petitioner was sentenced and at all times that he was confined in the State of Georgia; it is such at the present time. Confinement in a chain gang subject to the conditions set forth above was an inseparable part of the sentence imposed upon petitioner by the Superior Court of Bibb County, State of Georgia, on February 8, 1935.

7. While confined in said penitentiary, petitioner escaped from the Walton County Public Works Camp on or about July 13, 1939, and fled the State of Georgia.

8. Should petitioner be returned to the State of Georgia upon requisition of the Governor of that State referred to above, he will again be subjected to the penal methods and practices set forth in paragraph 5 of these Findings.

9. Upon his arrest in California petitioner filed a petition for a writ of habeas corpus in the Superior Court of the State of California, in and for the County of Santa Barbara. After hearing, petitioner's application for a writ was denied. Thereafter petitioner filed an application for a writ of habeas

corpus with the [91] District Court of Appeals of the State of California, and this petition was denied without hearing. Thereafter petitioner made application to the Supreme Court of the State of California for a writ of habeas corpus and this application was denied without hearing. In each application petitioner set forth substantially the same facts as set forth in the petition to this court and as found herein. Following denial of his application for a writ of habeas corpus by the Supreme Court of California, petitioner applied to that Court for a stay of rendition pending application to the United States Supreme Court for a writ of certiorari. This application for a stay was denied. Thereafter petitioner made successive applications for a similar stay to two Justices of the United States Supreme Court and these applications were denied. Thereafter petitioner filed the petition herein. It would have been futile for petitioner to have applied to the United States Supreme Court for a writ of certiorari because in the absence of a stay of rendition petitioner would have been transported to Georgia and his petition to the United States Supreme Court would have become moot.

10. At the hearing on the writ no showing was made that there is now, or at any time herein material was, available to petitioner in California any remedy against the action of the State of California, set out in paragraph 2 above, other than a petition for a writ of habeas corpus.

11. The return of respondent to the writ raised the issue in paragraph IV of said return that the petition for a writ did not state facts sufficient to constitute a cause of action against the respondent. Oral motions on this ground and on lack of jurisdistion of the court were made by respondent at the inception of the case, and the same motions were made after the close of the opening statement of petitioner's counsel. The court did not rule on said motions, but took the same under submission. Objections were also made on behalf of respondent during the trial to testimony and other [92] evidence proffered on behalf of petitioner, on similar grounds, and on the further ground that the testimony and other evidence proferred was incompetent, irrelevant and immaterial, and also on such additional grounds as indicated by the reporter's transcript. Such objections were not ruled upon but taken under submission as were also motions made to strike the testimony and other evidence after it was given.

12. The findings of fact contained in the opinion of the court filed February 3, 1950, are by this reference incorporated in these Findings of Fact as fully as if set forth in haec verba.

Conclusions of Law

1. Petitioner has exhausted all remedies available to him in the courts of the State of California. It was unnecessary for him to file a petition for a writ of certiorari in the United States Supreme Court for the reason that before it could have been

acted upon he would have been transported to the State of Georgia and his petition would have become moot.

2. The action of the Governor of California in issuing the warrant for petitioner's arrest and the apprehension and custody of petitioner by respondent and the intended delivery of petitioner by respondent to agents of the State of Georgia all constitute state action by the State of California within the meaning of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

3. The action of the State of California set forth in paragraph 2 of these Conclusions of Law has been and is based upon the judgment and sentence entered against petitioner on February 8, 1935, by the Superior Court of Bibb County, State of Georgia, and was performed and is being performed in order to effectuate said judgment and sentence and thereby renders the State of California an active participant in the effectuation of said judgment and sentence.

4. In the proceedings before it on February 8, 1935, the Superior Court of Bibb County, State of Georgia, failed to afford petitioner counsel and thereby deprived him of due process of law, in [93] violation of the Fourteenth Amendment to the Constitution of the United States.

5. In the proceedings before it on February 8, 1935, the Superior Court of Bibb County, State of

Georgia, entered its judgment and sentence against petitioner without a plea of guilty by petitioner and without a trial of issues of fact and thereby deprived petitioner of due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

6. The treatment accorded petitioner in the Walton County Public Works Camp of the State of Georgia, as set forth in paragraph 5 of the above Findings of Fact, constituted cruel, unusual and inhuman punishment, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

7. In the proceedings before it on February 8, 1935, the Superior Court of Bibb County, State of Georgia, sentenced petitioner to cruel, unusual and inhuman punishment and made such sentence an inseparable part of its judgment and sentence against petitioner and thereby deprived petitioner of due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

8. Because petitioner has been deprived of due process of law as set forth in paragraphs 4, 5, 6 and 7 of these Conclusions of Law, the judgment and sentence made and entered against him by the Superior Court of Bibb County, State of Georgia, on February 8, 1935, were and are void and without jurisdiction.

9. The action of the State of California set forth in paragraph 2 of the foregoing Findings of Fact and paragraphs 2 and 3 of these Conclusions of Law are, by virtue of the conclusions set forth in paragraphs 4, 5, 6, 7 and 8 of these Conclusions of Law, void and without jurisdiction.

10. There is now, and at all times herein material there was, available to petitioner in California no remedy against the action [94] of the State of California set forth in paragraph 2 of the foregoing Findings of Fact and paragraphs 2, 3 and 9 of these Conclusions of Law, other than petition for a writ of habeas corpus; petitioner, by reason of the facts set forth in paragraph 8 of the foregoing Findings of Fact, has fully exhausted his available remedies in the courts of the State of California.

11. In the event petitioner should be returned to the State of Georgia and required to complete the sentence passed upon him by the Superior Court of Bibb County, State of Georgia, on February 8, 1935, he will again be subjected to cruel, unusual and inhuman punishment, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States; and by reason thereof the action of the State of California set forth in paragraph 2 of the foregoing Findings of Fact and paragraphs 2 and 3 of these Conclusions of Law is void and without jursidiction in that it deprives petitioner of due process of law, in violation of the Fourteenth Amedment to the Constitution of the United States.

12. The custody of petitioner by respondent is void and without jurisdiction and petitioner is now entitled to immediate release from the custody of respondent and from apprehension and custody by any other officers of the State of California based upon the warrant of the Governor of that State, or any other warrant issued by said Governor based upon the requisition of the Governor of Georgia, or any requisition by that Governor seeking the return of petitioner to the State of Georgia for the purpose of completing the term or terms of his sentence or sentences imposed by the Superior Court of Bibb County, State of Georgia, on February 8, 1935.

13. Petitioner is entitled to his immediate and unconditional release, and the writ of habeas corpus is discharged.

14. The conclusions of law contained in the opinion of the court filed February 3, 1950, are by this reference incorporated in these Findings of Fact as fully as if set forth in haec verba. [95]

15. All motions on behalf of the respondent to discharge the writ on the ground that the petitioner's petition failed to state facts sufficient to constitute a cause of action and also on jurisdictional grounds, and other grounds indicated in the reporter's transcript which were taken under submission and not ruled on during the trial, are hereby overruled. All objections to the admission of testimony and other evidence, and motions to strike testimony and other evidence, made by respondent and taken

under submission by the court and not ruled upon during the trial, are hereby overruled.

Dated this 2nd day of May, 1950.

/s/ JAMES M. CARTER,
District Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 2, 1950. [96]

In the District Court of the United States of America, Southern District of California, Central Division.

No. 10586-C Civil

In re:

Application of Sylvester Middlebrooks, Jr., for a writ of Habeas Corpus.

JUDGMENT

The Findings of Fact and Conclusions of Law herein having been duly signed and filed:

It is ordered, adjudged and decreed that petitioner be unconditionally released and that the writ of habeas corpus heretofore issued and served upon respondent be discharged. This judgment shall be stayed but shall become final upon the expiration of the time within which respondent may appeal, in the event respondent takes no appeal, or in the event respondent does take an appeal, during the pendency of said appeal. Petitioner shall continue to

be enlarged upon bond pending an appeal and during an appeal upon the terms and conditions of the Court's order of February 3, 1950.

Dated this 2nd day of May, 1950.

/s/ JAMES M. CARTER,
District Judge.

Judgment entered May 2, 1950.
Book 65, Page 510.

EDUMUND L. SMITH, Clerk,

By C. A. SIMMONS, Deputy.

[Endorsed]: Filed May 2, 1950.

[Title of District Court and Cause.]

APPLICATION FOR ALLOWANCE OF AN APPEAL BY RESPONDENT, JOHN D. ROSS, SHERIFF OF SANTA BARBARA COUNTY, CALIFORNIA, AND FOR THE ISSUANCE OF A CERTIFICATE OF PROBABLE CAUSE.

Comes now the respondent, John D. Ross, Sheriff of Santa Barbara County, California, and respectfully makes application pursuant to the provisions of Section 2253 of Title 28, United States Code, for the allowance by respondent of an appeal from the decision, findings of fact, conclusions of law, and the judgment and order of the Court filed in the

above entitled cause on or about May 2, 1950, in the office of the Clerk of said Court.

1. Respondent respectfully represents that the Governor of California on or about the 13th day of September, 1949, issued a rendition warrant authroizing the arrest of petitioner, Sylvester Middlebrooks, Jr., as a fugitive from justice from the State of Georgia; that the Governor's warrant was issued pursuant to the receipt from the Governor of Georgia in the form and manner provided by Article IV, Section 2, Clause 2 of the Constitution of the United States, the Act of Congress regulating interstate extraditions (Section 3182 of Title 18, U.S.C.) and the provisions of the Uniform Extradition Act of the State of California; that the respondent thereupon apprehended and took into custody Sylvester Middlebrooks, Jr., in accordance with the rendition warrant issued by the Governor of California.

2. Respondent further represents that the Court by its decision, findings of fact, conclusions of law, and judgment and order filed in the office of the Clerk on or about May 2, 1950, in the above entitled habeas corpus proceeding, ordered the release and discharge of the petitioner named in such fugitive warrant from the custody of the respondent.

3. Respondent further represents that the constitutional question is involved as to whether the action of the Governor of California in issuing a warrant for petitioner's arrest as a fugitive from justice from the State of Georgia constituted state action

by the State of California in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

4. Respondent further represents that the constitutional question is involved in the above entitled cause as to whether the due process clause of the Fourteenth Amendment of the United States Constitution prevails over the provisions of Article IV, Section 2, Clause 2 of the Constitution of the United States and the Act of Congress regulating interstate extraditions (Section 3182, Title 18, U.S.C.). The Court's holding to the effect that the Fourteenth Amendment prevails over such provisions nullifies the operating effectiveness of Article IV, Section 2, Clause 2 of the Constitution of the United States and the Act of Congress regulating interstate extraditions. (Section 3182, Title 18, U.S.C.).

5. Respondent further represents that more than one-half [100] of the states of the United States, including the State of California, have enacted a uniform extradition act; that several such provisions of the Uniform Extradition Act, to wit, specifically Sections 1548.2, 1549.2, 1549.3, 1553.2 of the Penal Code of the State of California, are adversely affected by the ruling of the Court in the above entitled action to the extent that the operating effectiveness of such provisions are nullified by the holding of the Court that such named statutes were operative against petitioner Sylvester Middlebrooks, Jr., for unconstitutional purposes and with unconstitutional results, and in violation of the due

process clause of the Fourteenth Amendment of the Constitution of the United States.

6. Respondent further represents that the above entitled cause involves the constitutional question of whether the Eighth Amendment of the Constitution of the United States is applicable to the states of the Union.

7. Respondent further represents that the above entitled cause involves the question of whether the Fourteenth Amendment of the Constitution of the United States incorporates or does not incorporate the Eighth Amendment of the Constitution of the United States so as to make the same applicable to the states of the Union.

8. Respondent further represents that the issue is involved as to whether the infliction of cruel and unusual punishment by a demanding state in an extradition case is a litigable issue at the rendition stage and whether the infliction of such punishment in any event would require a complete release of the petitioner on his petition for a writ of habeas corpus.

9. Respondent further represents that there is involved the question in the above entitled cause as to whether remedies of the State of California were shown to have been exhausted by petitioner in view of the fact that petitioner failed to file [101] a petition for certiorari to the Supreme Court of the United States from a judgment of the Supreme

Court of California refusing relief to petitioner on his petition for a writ of habeas corpus.

10. Respondent further represents that there is involved in the above entitled cause the question of whether the petitioner at the rendition stage was entitled to relief in view of the fact that the remedies of the State of Georgia, the demanding state, were not shown to have been exhausted, and no showing made of the exhaustion of remedies available to the petitioner in the federal courts having territorial jurisdiction over the State of Georgia.

11. Respondent further represents that there is involved in the above entitled cause the question of whether the permissible scope of inquiry in an application for habeas corpus in cases having an extradition basis is limited at the rendition stage to (1) whether the person demanded has been substantially charged with crime in the demanding state, and (2) whether he is a fugitive from justice of the demanding state, or whether the permissible scope of inquiry at the rendition stage includes inquiries into issues as to whether petitioner was denied assistance of counsel in the demanding state, whether there were irregularities or violations of constitutional rights in connection with commitment and conviction for alleged offenses committed in the demanding state, and whether petitioner was subjected to cruel and unusual punishment while confined within a penitentiary in the demanding state.

12. Respondent further represents that there is

involved in the above entitled cause issues as to whether the petition for a writ states facts sufficient to constitute a cause of action, and whether the Court in the above entitled cause in discharging the petitioner from the custody of the respondent [102] sheriff exceeded its jurisdiction.

13. Respondent further represents that there are legal issues involved with respect to the overruling by the Court of objections by respondent of the admission of certain testimony and evidence at the hearing of the trial in the above entitled cause.

14. Respondent further represents that he is desirous of appealing from the decision, findings of fact, conclusions of law, judgment and order of the Court, and all matters relating thereto, filed in the above entitled cause on or about May 2, 1950, in the office of the Clerk of said Court.

Wherefore, respondent prays that the Court issue its order allowing said respondent John D. Ross, Sheriff of Santa Barbara County, California, to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decision, findings of fact, conclusions of law, judgment and order of the Court entered in the above entitled cause, and to issue a certificate of probable cause for such appeal.

Dated this 4th day of May, 1950.

DAVID S. LICKER,
District Attorney of the
County of Santa Barbara.

VERN B. THOMAS,
Assistant District Attorney of the County of Santa Barbara.

By /s/ VERN B. THOMAS,
Attorneys for Respondent, John D. Ross, Sheriff of Santa Barbara County, California. [103]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed May 8, 1950.

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL AND CERTIFICATE OF PROBABLE CAUSE

The respondent, John D. Ross, Sheriff of Santa Barbara County, California, having made application to the Court for the allowance of an appeal and due notice of such application having been made, and it appearing to the Court that the application for the allowance of an appeal was made in good faith, and that there is probable cause for the taking of the same, and the Court being fully advised in the premises.

It Is Hereby Ordered, Adjudged and Decreed that the respondent, John D. Ross, Sheriff of Santa Barbara County, California, be and hereby is permitted to appeal to the United States Circuit Court

of Appeals for the Ninth Circuit from the decision, findings of fact, conclusions of law, judgment and order in the above-entitled cause, and all matters relating thereto, entered and filed in the office of the Clerk on or about May 2, 1950.

It Is Further Ordered, Adjudged and Decreed that there is [105] probable cause for the taking of such appeal.

Dated this 8th day of May, 1950.

/s/ JAMES M. CARTER,
District Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 8, 1950. [107]

[Title of District Court and Cause.]

APPOINTMENT OF ATTORNEYS

I, Sylvester Middlebrooks, Jr., hereby appoint and retain A. L. Wirin and Loren Miller, of Los Angeles, and Elizabeth Murray, of Santa Barbara, to represent me as my attorneys in and before the United States Court of Appeals, Ninth Circuit, in connection with any appeal that has been or may be taken from the Judgment in a proceeding entitled in re: Application of Sylvester Middlebrooks, Jr., for a Writ of Habeas Corpus (file No. 10586-C) in the District Court of the United States of Amer-

ica, Southern District of California, Central Division.

Dated: This 5th day of May, 1950.

/s/ SYLVESTER MIDDLEBROOKS, JR.,

Affidavit of Service Mail attached.

[Endorsed]: Filed May 10, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that John D. Ross, Sheriff of Santa Barbara County, California, respondent above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the decision of the Court, findings of fact, conclusions of law, and final judgment of the Court entered in the above entitled action on May 2, 1950.

Dated this 10th day of May, 1950.

/s/ DAVID S. LICKER,
District Attorney of the
County of Santa Barbara.

/s/ VERN B. THOMAS,
Attorney of the County of Santa Barbara, California.

Attorneys for Appellant John D. Ross, Sheriff of Santa Barbara County, California.

[Endorsed]: Filed May 11, 1950. [110]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To: Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, Central Division.

Will you please take notice that John D. Ross, respondent in the above entitled action, and appellant, has appealed to the United States Court of Appeals for the Ninth Circuit from that certain decision of the Court, all findings of fact, all conclusions of law, and judgment and order filed in the office of the Clerk of said Court on or about May 2, 1950, discharging the relator, Sylvester Middlebrooks, Jr., from the custody of the respondent John D. Ross, Sheriff of Santa Barbara County, California, and from each and every part of said decision, findings of fact, conclusions of law, judgment and order, as well as from the whole thereof, and the respondent John D. Ross hereby requests and designates that there be made up and prepared a complete record in bulk on appeal of all proceedings and all matters relating to the above entitled cause, including the pleadings and exhibits attached [111] thereto, all findings of fact and conclusions of law, disapproval and objections of respondent to petitioner's proposed findings of fact, conclusions of law and judgment, the opinion of the Court, the order of the Court of February 7, 1950

releasing the petitioner on bail, the judgment of the Court, application for allowance of an appeal and issuance of a certificate of probable cause, order allowing appeal and certificate of probable cause, notice of appeal, and reporter's transcript of all of the testimony and evidence offered or taken or received, objections and motions of counsel, and all rulings of the Court, and all briefs.

Dated this 11th day of May, 1950.

DAVID S. LICKER,
District Attorney of the County of Santa Barbara.

VERN B. THOMAS,
Assistant District Attorney of the County of Santa Barbara.

By /s/ VERN B. THOMAS,
Attorneys for Respondent, John D. Ross, Sheriff of Santa Barbara County, California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 12, 1950. [113]

In the United States District Court, Southern District of California, Central Division.

Honorable James M. Carter, Judge presiding.

No. 10586-C

In re:
APPLICATION OF SYLVESTER MIDDLEBROOKS, JR., FOR A WRIT OF HABEAS CORPUS.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California
Tuesday, December 20, 1949

Appearances:

For the Petitioner:
MARGOLIS & McTERNAN, by
JOHN T. McTERNAN, Esq.,
HERBERT SIMMONS, JR.

For the Respondent:
DAVID S. LICKER,
District Attorney of the County of Santa Barbara, California, by

VERN B. THOMAS, ESQ.,
Assistant District Attorney of the County of Santa Barbara, California. [1]

The Clerk: No. 10586-C, Civil, Sylvester Middlebrooks, Jr. v. The Sheriff of Santa Barbara County, hearing on return of writ of habeas corpus.

Mr. Thomas: Your Honor, I was advised by telegram under date of December 17th, by Eugene Cook, Attorney General of the State of Georgia, that he had forwarded to the court on that day the brief and desired to appear in the case as amicus curiae.

The Court: The brief was received. The original was received by me. I will hand it to the clerk. An order will be made permitting the filing of the brief and the association solely for the purpose of the brief as amicus curiae, so you won't have to serve counsel with any other documents. Obviously he is not going to appear personally, and the briefs will be ordered filed.

Have you prepared a return?

The Clerk: Yes, I am filing it.

Mr. Thomas: The return has been filed with the memorandum.

The Court: Is the petitioner present?

Mr. McTernan: Yes, he sits alongside of me at counsel table.

The Court: The record will show the Sheriff of Santa [2*]
Barbara County produced the petitioner pursuant to the writ.

The issues in a habeas corpus case are raised by

*** Page numbering appearing at top of page of original Reporter's Transcript.**

a traverse to the return. What is your pleasure on that?

Mr. McTernan: Your Honor, we have certain evidence that we will offer in support of the allegations of the petition. Before doing that, however, I would like an opportunity to make an opening statement to your Honor.

The Court: Before we get to that, then, is it satisfactory to both sides to treat the petition for the writ of habeas corpus as the traverse to the return? The issues in your habeas corpus proceedings aren't raised by the petition for the writ and the return, they are raised by the return and what is called a traverse. That, in substance, is what is in your petition for the writ. So, if satisfactory, we will consider your petition for the writ of habeas corpus as the traverse to the return.

Mr. McTernan: That is satisfactory with us, your Honor.

The Court: Is that satisfactory, counsel?

Mr. Thomas: Pardon me just one moment, your Honor.

We will stipulate that the matters set forth in the return of the Sheriff will be considered denied, your Honor, by the petitioner.

Mr. McTernan: Obviously the allegations of the petition set up affirmative matter. We will have to treat it as you suggest. [3]

The Court: The stipulation that they be denied is all right as far as it goes. But as to any affirmative matters, the court will treat the petition as

the traverse. That has been the practice around here. It raises the same issues and your record then is in proper shape.

Do you care to make a statement?

Mr. McTernan: Yes. Before I do, may I enter the appearance of Mr. Herbert Simmons for the petitioner? Mr. Simmons is not in the court room at the moment, your Honor. He will be here.

I will ask leave to make an opening statement, if the court please, because we are presenting what we consider to be somewhat novel theories in this matter, and I would like an opportunity to state as briefly as I can to the court the facts which we hope to show and the theory upon which we think the court is justified and would be required under the law to grant the petition which we seek.

The petitioner Sylvester Middlebrooks is a negro from Georgia. He was charged in early 1932 with five acts of burglary and theft. We will show by the evidence here that the acts with which he was charged at that time are the same acts for which he was later indicted. The charge involving these five acts of burglary and theft was made either in the very closing days of 1931 or early in 1932. He had a hearing before the juvenile authorities of Georgia on January 17, 1932. [4] At that time Sylvester Middlebrooks was fourteen years old. As a result of that hearing he was ordered committed to the Georgia Training School for Boys.

I am informed that after his confinement to the

Georgia Training School for Boys, Sylvester Middlebrooks escaped twice. After his second escape he was arrested sometime in either June or July of 1934. He at that time was aged seventeen. He was held in jail from the time of his arrest for a period of seven or eight months without counsel and without charges having been served upon him or handed to him. In November, 1934 an indictment was returned by the Grand Jury of Bibb County, Georgia, charging Sylvester Middlebrooks with five acts of burglary and theft, which, as I said before, were the five acts with which he was charged as a fourteen-year-old juvenile.

In this respect a significant disparity in the record will appear. On January 7, 1932 at the alleged juvenile hearing it is stated in the records of Georgia that Sylvester Middlebrooks admitted five burglaries and thefts against five named individuals involving the breaking and entering of their homes, and the removal of personal property therefrom. The indictment which was returned in November, 1934, charges five acts of burglary and theft against the same named individuals whose names appear in the record of the juvenile proceedings, and of these five acts of theft, four are alleged [5] to have occurred at a date following January 7, 1932 by as much as six or seven months. So that the record of Georgia, which states that Sylvester Middlebrooks admitted four acts of burglary and theft were alleged in the indictment of the Grand Jury to have occurred six or seven months after the date on which he is alleged to have admitted them.

After the return of this indictment the record from the State of Georgia will show that the defendant waived formal arraignment, that the defendant pled guilty to each of the five counts; and there is no entry in the portion of the record provided therefor of the name of the defendant's attorney. This occurred, according to the Georgia record, on February 8, 1935, some seven or eight months after arrest.

We will show by oral testimony that the record is untrue; that the defendant Sylvester Middlebrooks did not receive a copy of the indictment or any other information concerning the charges, except a statement by the judge that he had violated the laws of Georgia; that he did not plead guilty; that, in fact, he said he had not violated the laws of Georgia and he wanted a trial before a jury, and that after he said that the judge passed sentence upon him, ordering him committed for one year on each count, the sentences to run consecutively; and that, in fact, there was neither a plea of guilty nor a trial, and that after his imprisonment pursuant to this sentence Sylvester Middlebrooks was held under [6] conditions which any civilized nation would regard as intolerable and violative of the basic standards of decency, and that Mr. Middlebrooks ecaped from these conditions which can only be described as cruel and unusual punishment, and later entered the Army of the United States; that he deserted during his period of service, he was apprehended, tried before a

Court Martial, convicted, sentenced and served a sentence in excess of three years, at the end of which he was arrested on a fugitive warrant requested by the State of Georgia.

We will also show as the petition alleges — I think it probably will be admitted as facts, your Honor — that following his apprehension by the California authorities pursuant to the fugitive warrant requested by the State of Georgia, he sought relief by application for writ of habeas corpus to the Superior Court in and for the County of Santa Barbara; that after hearing, that application was denied; that application was subsequently made to the District Court of Appeals in the appropriate district, and that was denied; thereafter petition for writ of habeas corpus was filed with the Supreme Court of the State of California and that was denied; thereafter application for a stay pending the filing of a petition for certiorari with the United States Supreme Court was made to Mr. Justice Douglas, the supervising Justice of this Circuit, and that application was denied without [7] prejudice. You know Mr. Justice Douglas has been convalescing with injuries. We don't know why he denied it without prejudice. probably in his circumstances he was unable to give it full consideration. The application was then presented to a Justice of the United States Supreme Court in Washington, Mr. Justice Black, and it was by Mr. Justice Black denied. Thereafter a petition for writ of habeas corpus was filed with this court, and this

court granted an alternative writ which was returned today. By this application, your Honor, we seek release from California's custody, not Georgia's custody. We ask relief from custody imposed by California. We assert that custody in California is in violation of the Constitution of the United States in that it deprives this petitioner of due proces of law. It is the action of the State of California about which we complain in this proceeding. It was California that took Sylvester Middlebrooks into custody at the request of the Georgia authorities. It was California's fugitive warrant that was the means of his arrest. It was the California jails which held him. It was California's governor who consented to turn him over to Georgia. It was California's law enforcement agency, the District Attorney of Santa Barbara County, which asserted the rights and powers of California to hold Sylvester Middlebrooks and to turn him over to Georgia. And it was California's courts which in denying Middlebrooks' successive petitions approved his being turned over to Georgia. [8] And, finally, it is California's jailers who today stand ready to turn Middlebrooks over to Georgia should this court relax its protection under the Constitution of the United States. It is because of these acts that California denied Middlebrooks' due proces of law. It is because of that that we seek relief by habeas corpus in this proceeding.

Now, we reach these conclusions, if the court please, by two lines of reasoning, which are closely

similar and which we believe complement each other. The first is that California was without jurisdiction to act, and its proceedings were, therefore, without due process of law. This lack of jurisdiction of California to act depends upon three factors. In the first place, Sylvester Middlebrooks was deprived of counsel in the felony prosecution before the Georgia Court in Bibb County. This shows on the face of the papers which were sent to California as the basis for the request for rendition. We are here prepared to show these facts in greater detail. And this defect in the proceedings of Georgia was jurisdictional under cases which we will discuss with your Honor at a later point in this proceeding. Therefore Middlebrooks was not convicted under the laws of Georgia, and there is, therefore, no basis for California holding him and returning him to Georgia.

Secondly, Middlebrooks was deprived of a trial. The Georgia records, which will be before this court in a moment, [9] show that a seventeen-year-old boy waived formal arraignment and reading of the indictment and pled guilty to five felony counts carrying very heavy sentences. Whether a seventeen-year-old boy without counsel and unfamiliar with the procedures of a criminal court could effectively make such a waiver as a matter of law is something for this court to decide on the basis of the facts which we intend to present here. But we will show that in fact there was no such waiver; that when he was brought before that judge, the judge

said, "Why do you go about violating the laws of this State?" To which Middlebrooks said he had violated no laws and he wanted a lawyer and he wanted a jury trial, and instead he was sentenced to five years in the state prison. So there was no trial, there was no valid proceeding by which a sentence was validly passed, and therefore Middlebrooks was not tried and convicted, and there is, therefore, no basis for California holding him at the request of Georgia.

Thirdly, Middlebrooks has not fled from justice. On the contrary, he has fled from a barbaric system of criminology which has stained the reputations of the slave-traders themselves. This is the system which the United States Court of Appeals for the Third Circuit has described as the infliction of cruel and unusual punishment, and as a failure by the State of Georgia, and I quote, "in its duty as one of the sovereign states of the United States to treat its [10] convicts with decency and with humanity."

I am quoting, if the court please, from the case of Johnson vs. Dye, 175 Fed. (2d) at page 256.

Thus for these three reasons there is no basis in law under the Constitution of the United States for the action taken and about to be taken by the State of California. Sylvester Middlebrooks was not a fugitive from justice, he was not a fugitive from a conviction properly arrived at, and therefore for the State of California to hold him at the request of the State of Georgia was a holding with-

out proper basis in the law, and therefore is a holding without due process of law.

Our second line of reasoning is very close to what has already been said. In this matter California, if the court please, does not act alone, it acts at the request of Georgia. There is, therefore, a concerted action involving both states, and in the present posture of the case, it is the action of California which is the key and of controlling importance. The action of the State of California is the means whereby the action already taken and proposed to be taken by the State of Georgia can be effectuated. Thus California becomes a participant in the deprivations of constitutional rights which I have just indicated, and which we stand ready to prove here today. By holding Sylvester Middlebrooks and by turning him over to Georgia, California participates in the punishment [11] of a man convicted as a boy seventeen years old without counsel; California participates in the punishment of a man convicted as a seventeen-year-old boy without a trial; and California participates in the heinous Georgia chain-gang system whereby all convicts, but especially Negro convicts, are treated in a way that casts a blot upon American civilization in a way that denies to the State of Georgia the right to be treated as a sister state in the American Commonwealth, entitled to call back from another state a man to be subjected to this kind of thing.

As we have said, it is California's action in depriving Middlebrooks of his constitutional rights which constitutes the basis for our petition here.

I would like to suggest, if the court please, an analogy. We recognize in submitting this theory to the court that we are submitting something which is somewhat novel, but we submit that it has ample basis in both reason and in principle, and in analogy to other fields of the law. I would like to call to your Honor's attention, if I may, the restrictive covenant cases. It was the old thesis upon which California courts and the courts of nearly every state in this Union operated, that restrictive covenants were simply private agreements, that the Constitution gave no protection against the private acts of private parties, and therefore the constitutional grounds so repeatedly urged for the non-enforcement [12] of these covenants were ignored and disregarded by the courts. But it was finally perceived that these covenants, while they were private agreements, were literally scraps of paper, unless they were enforced by courts; the objectives of the restrictive covenants were attained not by the private bond of private individuals, but by decrees entered by courts of law, and thus it was clear that it was State action, the action of the State Courts which prevented the use of their own homes by Negro citizens who had purchased them. Once this was clear, the Supreme Court was quick to strike down State Court decrees enforcing restrictive covenants because it was quickly seen that the State Court decree was the crucial factor in the case, and that that State Court decree denied equal protection

of the law and due process of law under the Fourteenth Amendment.

So here, the old thesis has been that the rendition of a fugitive by the asylum state was a mere ministerial act. As long as there was a charge or a conviction in the requesting state, if the person in custody was, in fact, the fugitive requested, or, in fact and in law, a fugitive, or, finally, if the papers were properly made out, then under the old theory the asylum state had no alternative but to render up the fugitive to permit his delivery to the requesting state.

But there is evident in the law a new trend. One in which the asylum state recognizes that it has responsibilities [13] in this process commensurate with the importance of its power; a recognition that the asylum state is the state which provides the necessary and key action, state action, which turns the fugitive back to what is in this case euphoniously called justice. And this recognition, therefore, leads to the conclusion that the asylum state will act only when its action conforms with due process of law. And in recognizing this constitutional responsibility, the asylum state has examined its action in light of and in connection with the action of the requesting state, and when these together show a deprivation of due process, rendition has been denied.

This, your Honor, is something which is receiving growing recognition both in the courts and by the text writers. May I call your attention to a note

in 47 Columbia Law Review at page 470. I think it is cited in our memorandum of points and authorities, but I am not sure, where the writer indicates the old thesis which I have described and comments upon several cases in which the asylum state recognizing the responsibility to examine its own action and the constitutional consequences of its own action has opened the record on habeas corpus proceedings to take evidence on such things as the danger of lynching if the fugitive is returned. That was the Mattox case, Mattox vs. Superintendent of County Prisons, 152 Penn. Sup. 167. Another case in New York in which the [14] court received evidence concerning the cruel and inhuman punishment against the fugitive prior to his escape is Reed vs. Warden, City Prison, 63 Sup. (2d) 620. And the case of Johnson vs. Dye in the Pennsylvania courts, 49 Atl. (2d) 195, where the State Court took evidence on the irregularity of the trial and the probability of future maltreatment of the fugitive should he be returned to the requesting state, which happened, also, to be Georgia.

There are a number of unreported cases on the subject, your Honor, which are collected in this Law Review note, and which I believe are also indicated in our memorandum of points and authorities.

Finally, there is the case of Johnson vs. Dye in the Third Circuit, 175 Fed. (2d) 250, in which on habeas corpus, in proceedings closely similar to the one here, because in the Johnson vs. Dye litigation the fugitive had sought habeas corpus unsuccessfully

in the State Courts, although he had not exhausted the State Courts procedures and had then gone into the Federal Courts seeking a writ of habeas corpus, and there the court took evidence on three contentions: first, that he was convicted as a result of perjured testimony compelled by state authorities; secondly, that he had been forced to serve in a chain gang and submitted to cruel and inhuman punishment; and, thirdly, the danger of lynching. And it was on the second of these grounds, the cruel [15] and inhuman punishment ground, that the Third Circuit held that habeas corpus would lie and that the prisoner should be discharged.

That case was later reversed by the United States Supreme Court on a different ground, namely, that it was necessary to exhaust the state procedures of Pennsylvania.

The Court: Let me inquire there. I checked the reference in the Supreme Court reports. Apparently it indicates that certiorari was granted, judgment reversed, and it cites Ex parte Hawk. Was there any discussion reported in any law weekly?

Mr. McTernan: It appears at 18 Law Weekly, page 3418, and the order—

The Court: What was that?

Mr. McTernan: Page 3418. It simply cites the Hawk case. As your Honor knows, the Hawk case rests simply on exhaustion of state remedies.

The Court: I notice the Stanford Law Review has an article this month and it discusses the Johnson vs. Dye case at length. They take the view that

the reversal in the Supreme Court was a reversal on the ground that Judge Biggs had held it wasn't necessary to exhaust state remedies. The article criticizes both parts of Judge Biggs' decision; but they take the view you did, that the reversal must be viewed as having been made upon the ground that the judge in the [16] Circuit held that you need not exhaust state remedies.

Does that complete your statement, rather than argument?

Mr. McTernan: I may have gone a little far in this, your Honor. I did so because I think that many questions are going to come up concerning the admissibility of evidence, and I wanted your Honor to know exactly the theory—

The Court: I am glad to have your theories on this. I am one step ahead of you. I told my law clerk this morning that one problem that would come up would be the analogy of the restrictive covenant cases, although it wasn't referred to in your memorandum. So chalk one up for my side.

Mr. McTernan: I think with that, your Honor, we are ready to proceed.

Mr. Thomas: At this time the respondent sheriff, your Honor, will move the court to discharge, dismiss the writ issued in this case, on the ground that the petition for a writ and counsel's opening statement, neither, state facts sufficient to constitute a cause of action.

If I may at this time, your Honor, I would like to discuss authorities dealing with the matter.

The Court: Let me suggest this. This is an interesting case, aside from the sentimental talk about it. From a legal standpoint it is an interesting proposition. I read over in detail the memorandum filed by the Georgia authorities. It is a very well written memorandum. I have not seen your [17] memorandum here yet. What I would like to do, if satisfactory with you, would be to take your motion under submission at this time without ruling on it, take the evidence in this case which shouldn't be lengthy — should it?

Mr. McTernan: We have no more than two witnesses, your Honor.

The Court: (Continuing) And then discuss your motion and your authorities in the light of what is alleged and what is proved. Is that satisfactory? I think we will save time that way.

Mr. Thomas: That is satisfactory, your Honor.

The Court: Do you care to make any opening statement without discussing in detail the authorities, but a general statement of your position, or do you care to wait on that?

Mr. Thomas: With regard to my position, your Honor, it is simply this: that the tradition and scope of habeas corpus only permits an inquiry into certain phases. Has a demand been made by the governor of a state for the extradition of the prisoner? Is his demand accompanied by certain authenticated documents? And has the prisoner of the demanding state been determined to be a fugitive? And have those facts been certified?

We contend that the evidence in this case, according to our return, clearly shows that the prisoner is now held pursuant to a warrant issued by the governor of the State of [18] California, which was issued pursuant to the receipt of the required documents from the State of Georgia.

The Court: I think I have your position in mind. Proceed.

Mr. McTernan: Mr. Middlebrooks, take the stand, please.

SYLVESTER MIDDLEBROOKS, JR.

the petitioner herein, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Sylvester Middlebrooks, Jr.

Direct Examination

By Mr. McTernan:

Q. You are the petitioner in this case, Mr. Middlebrooks?

A. Yes.

Mr. Thomas: At this time, your Honor, the respondent sheriff will object to the introduction of any evidence on the ground that the petition and counsel's statement, opening statement, do not constitute a cause of action, and the witness' testimony would be immaterial and not bear on any issue involved.

(Testimony of Sylvester Middlebrooks, Jr.)

The Court: The objection will be overruled, but it will [19] be subject to change by the court's ruling subsequently when we get into the argument on it if the court reaches a decision in your favor. May it be stipulated that counsel's objection may go to all of this line of testimony, counsel, without having to be made each time?

Mr. McTernan: So stipulated.

The Court: All right.

By "this line of testimony" I mean all testimony from this witness.

Mr. McTernan: I take it that counsel's objection really goes to all evidence which we offer, and I am willing to stipulate that it so run without having to be repeated.

The Court: Is that satisfactory?

Mr. Thomas: Satisfactory.

Q. By Mr. McTernan: Mr. Middlebrooks, when were you born?

A. 1917, February 11th.

Q. Where were you born?

A. Macon, Georgia, Bibb County.

Q. Did you live there continuously until the year 1931?

A. Yes, sir.

Q. In 1931 or early 1932 were you arrested?

A. Yes, sir.

Q. Was that by authorities in the State of Georgia? [20]

A. Yes, sir.

(Testimony of Sylvester Middlebrooks, Jr.)

Q. At that time did they accuse you of having committed a crime?

A. Yes, sir.

Q. What did they accuse you of having done?

A. Burglary.

Q. Did they accuse you of more than one act of burglary, if you recall?

A. Yes, sir.

Q. Do you recall how many?

A. Five.

Q. At that time, Mr. Middlebrooks, did they hand you any paper or writing which contained any statements with reference to these burglaries that they accused you of?

A. No, sir.

Q. Were you taken before a court?

A. Yes, sir.

Q. Do you remember the name of the court?

A. Do you mean in this Federal Court — I mean Supreme Court?

Q. I am referring to the time when you were arrested in either late '31 or early '32.

A. In Juvenile Court.

Q. Was a judge there, and some proceedings in front of a judge? [21]

A. I don't know, sir, who all was in there, but I know there was quite a few people in there.

Q. Do you know what happened in that proceeding?

A. I was sent to the reformatory from there.

(Testimony of Sylvester Middlebrooks, Jr.)

Q. Going back a moment, at the time of your arrest were you living with your family?

A. Yes, sir.

Q. What did your family consist of at that time?

A. My mother, my father, and sisters, and brother.

Q. What did your father do?

A. He was a fireman.

Q. Do you mean on a railroad?

A. No, sir. It is a place called Blind Eye Academy.

Q. An academy named what?

A. Blind Eye, that is all I know.

Q. Blind Man?

A. Blind Eye Academy. It is for blind children, it is a big school.

The Court: An academy for blind people?

The Witness: Yes, sir, a school.

Q. (By Mr. McTernan): Prior to the time you were arrested on this occasion, had you gone to school?

A. Not much.

Q. What was the last grade in school that you were in before you left school? [22]

A. Third grade, I think it was.

Q. How old were you when you left school?

A. Around thirteen, I imagine, twelve, something like that.

Q. Did you finish the third grade?

A. No, sir, I didn't complete it.

Q. Had you ever been in a court of law before?

(Testimony of Sylvester Middlebrooks, Jr.)

A. No, sir, I hadn't.

Mr. McTernan: Your Honor, I offer as Petitioner's Exhibit 1 a document which I have shown counsel, a certified copy of a juvenile case record in the name of Sylvester Middlebrooks.

The Court: Subject to the objection of counsel heretofore made by stipulation it will be received in evidence as Petitioner's Exhibit first in order.

The Clerk: Petitioner's Exhibit 1 in evidence.

(The document referred to was marked Petitioner's Exhibit 1, and was received in evidence.)

PETITIONER'S EXHIBIT No. 1

Case No. 3034

Name of child, Sylvester Middlebrooks.

Age 14, sex M, color C.

Birth, February 11, 1917.

Lives with parents.

Residence, 115 Hawkins Avenue.

Complainant, Superior Court.

Complaint, burglary.

Father, Sylvester Middlebrooks.

Mother, Willa Middlebrooks.

(Testimony of Sylvester Middlebrooks, Jr.)
Report of investigation, admits aiding and leading in 8 burglaries—Mrs. Bishop, J. A. Smith, A. W. McClure, J. A. Hunt, Clifford McKay, Mr. Chandler and two houses he pointed out.

Date of hearing, January 7, 1932.

Disposition, committed to Georgia Training School for Boys.

Certified to be a true copy.

/s/ ALICE DENTON,
Clerk of Juvenile Court,
Bibb County, Georgia.

Admitted Dec. 20, 1949.

Q. (By Mr. McTernan): You say that you were sent to a reformatory after that juvenile hearing. Was the name of that reformatory the Georgia Training School for Boys?

A. Yes.

Q. And can you recall approximately the date of that hearing?

A. No, sir, I don't. [23]

Q. Does the date January 7, 1932, refresh your recollection in any respect?

A. I know it was in the wintertime when I was sent there.

(Testimony of Sylvester Middlebrooks, Jr.)

Q. Was it in the wintertime when the hearing was held?

A. Yes, I guess it was.

Q. You can't recall any closer than that, whether it was in the month of January?

A. No, sir, I don't remember.

Q. How long did you remain in the Georgia Training School for Boys?

A. The first time I stayed there three months and about two weeks.

Q. Did you run away from there at that time?

A. Yes, sir.

Q. Where did you go?

A. Back to my home.

Q. How long did you remain out of the training school?

A. About a month.

Q. Were you arrested?

A. I was out a month before I was arrested.

Q. After you were arrested were you sent back to the training school?

A. They locked me up in jail and from there I was sent back. [24]

Q. How long did you remain in the training school after you went back?

A. Five months and about two weeks this time.

Q. Did you run away the second time?

A. Yes, sir.

Q. This was sometime in 1932, was it, or had you gone over into 1933?

(Testimony of Sylvester Middlebrooks, Jr.)

A. It was 1933, the last time I ran away from there.

Q. Where did you go the second time that you ran away?

A. I went to New York.

Q. Did you go to New York through South Carolina?

A. Yes, sir, I did.

Q. Did you get in any trouble in South Carolina?

A. No, sir, not at that time.

Q. Were you arrested again in Georgia after your second escape from the training school?

A. Not until I came back in 1934.

Q. About what month was that in 1934 that you were arrested?

A. It was either June or July.

Q. What were you doing in Georgia when you came back that time?

A. I came back home to see my mother and father.

Q. Was your father still a fireman for this academy for the blind? [25]

A. At that time I don't remember.

Q. How old were you, Mr. Middlebrooks, when you came back home in June or July of 1934 to see your family?

A. Seventeen.

Q. When you were arrested this time where were you held?

A. In jail.

(Testimony of Sylvester Middlebrooks, Jr.)

Q. Where?

A. Bibb County, Macon, Georgia.

Q. How long did you remain there?

A. From June or July up until February 8th, that is when they tried me, and I stayed there until March, that is when I was taken to the chain gang.

Q. When you were in jail from June or July, 1934, down to February of '35, did you have a lawyer?

A. No, sir.

Q. Did anybody hand you any writing setting forth what you were charged with having done?

A. No, sir.

Q. Did your family come to see you?

A. My mother come to visit me.

Q. Did anybody tell you what you were in jail for at that time?

A. No, sir.

Q. At this time in 1934 when you were arrested, do you [26] know what your father's income was?

A. No, sir, I don't.

Q. Were there other children in the family besides you?

A. Yes, sir.

Q. How many?

A. I have four sisters and one brother.

Q. Was your mother working at that time?

A. I don't remember.

Q. At any time in November, 1934, after you

(Testimony of Sylvester Middlebrooks, Jr.)
were arrested, and while you were in jail there at Macon, Georgia, did anybody hand you a document called an indictment?

A. No, sir.

Mr. McTernan: At this time, your Honor, I offer as Petitioner's Exhibit 2 a document entitled "Indictment, State of Georgia, Bibb County," in five counts, dated in the November term of the court, 1934, and certified by the clerk of the Bibb County Superior Court, State of Georgia, on the 30th day of November, 1948.

Mr. Thomas: It goes in under the same objection.

The Court: It will be admitted in evidence subject to the same general objection heretofore made by counsel.

Mr. McTernan: Your Honor, since this is before you and not before a jury, may I point out that the five counts with which the accused is charged set up names of the victims [27] which are identical with the five named on that juvenile record, which was Petitioner's Exhibit 1, and you will notice that Petitioner's Exhibit 1 recites an admission of the commission of these five acts at a hearing of January 7, 1932, and that the allegations in the indictment as to four of those acts place them as occurring in July and August, 1932.

The Court: Counsel, you only point that out as an irregularity; you don't contend that there is much significance from a legal standpoint attached

(Testimony of Sylvester Middlebrooks, Jr.)
to that, do you? The law of Georgia is probably similar to the law of California and Federal law, that you can allege one date in an indictment and generally prove another. You don't make any particular point that that is denial of due process?

Mr. McTernan: I think it may go, your Honor, to the inference to be drawn from these documents that there was a plea of guilty.

The Court: I have noted your comment on it. I see that the first count refers to Mrs. A. W. McClure. Petitioner's Exhibit 1 shows A. W. McClure.

Count 2 refers to Mrs. James A. Smith, and there is a J. A. Smith on the other document.

Count 3 refers to a dwelling of Clifford McKay, and there is a Clifford McKay on Exhibit 1.

Count 4 refers to the dwelling of W. A. Bishop, and there [28] is a Mrs. Bishop on Petitioner's Exhibit 1.

Count 4 refers to the dwelling of J. A. Hunt, and there is a J. A. Hunt on Petitioner's Exhibit 1.

Mr. McTernan: You will also notice, your Honor, the reverse or the last page of Petitioner's Exhibit 2 where the entries are made concerning the waiver of arraignment and the plea of guilty, there is no entry for the name of the defendant's attorney.

The Court: Is this the only document that we will have in the record showing whether or not petitioner had counsel?

Mr. McTernan: The only other documents that

(Testimony of Sylvester Middlebrooks, Jr.)
we have are the sentences, which are not very helpful on the question.

Q. (By Mr. McTernan): Mr. Middlebrooks, showing you Petitioner's Exhibit 2, at any time before what you have referred to as the trial in February, 1935, was a document similar to that handed to you?

A. There wasn't anything handed to me.

Q. Do you know, or were you ever told whether such document was given to any member of your family or any friend or representative of yours?

A. No, sir.

Q. When were you first told, Mr. Middlebrooks, that you were going to be brought to trial after your arrest in 1934? [29]

A. On the morning of February 8th.

Q. Who told you?

A. The jailer.

Q. Do you remember his name?

A. No, sir, I don't.

Q. What did he say to you?

A. He told me to get ready for trial in about 15 or 20 minutes.

Q. What did you say?

Mr. Thomas: We move that be stricken as hearsay, your Honor. The records of the court would be the best evidence.

The Court: Objection overruled. But, of course, you still have your general objection by stipulation.

A. I wanted to know what I was going to be——

(Testimony of Sylvester Middlebrooks, Jr.)

Q. (By Mr. McTernan): Mr. Middlebrooks, try to state what it is you said, rather than what you wanted. Can you begin your answer with "I said," and then state in substance what you said?

A. Well, I got ready to go when he came for me.

Q. When he told you to be ready for trial in 15 or 20 minutes, did you make a reply to that?

A. I don't know what I was going to be tried for, that was one thing.

Q. Did you say that?

A. I don't remember. [30]

Q. You don't recall whether you made a reply or not, is that right?

A. No, sir.

Q. In 15 or 20 minutes what happened?

A. He came and taken me down to the court room.

Q. When you walked into this court room was there a judge sitting behind a bench?

A. Yes, sir, the judge was sitting behind this bench, and the sheriff was standing there beside him talking in a low voice.

Q. Was there anyone else in the room?

A. No, sir. No more than the jailer that brought me down there.

Q. There were you and the jailer and the sheriff and the judge in the room, is that right?

A. That's right, sir.

(Testimony of Sylvester Middlebrooks, Jr.)

Q. Did you hear anybody in that room referred to as a district attorney or as a prosecutor?

A. No, sir.

Q. Did you have anybody there acting as your lawyer?

A. No, sir.

Q. What was said to you and what did you say after you got into the court room? Tell us in the order that it happened as best you remember.

A. After this judge and the sheriff stopped talking in [31] a low tone of voice, the judge called me up in front of him and said, "Don't you know you can't go around breaking the laws of Georgia?" So I told him I hadn't broken any laws of Georgia since I was tried for it in 1932.

The Court: Just a minute. Read the last part.

(The answer was read by the reporter.)

The Witness: That is right.

Q. (By Mr. McTernan): What was said next?

A. I told him I wanted a lawyer and a jury trial. After that he told me, "I could give you five years on each — twenty years on each count," he said, "but I will give you five years in Georgia State Prison. If you come before me again I will give you twenty years." And that was all.

Q. Did you make any statement after the judge said that?

A. No, sir, not that I remember.

Q. How long did this take?

A. About two or three minutes.

(Testimony of Sylvester Middlebrooks, Jr.)

Q. Then what happened?

A. The jailer taken me back upstairs.

Q. Back to the cell that you had been in?

A. Yes, sir.

Q. How long did you remain there?

A. The next month a warden and guard came from Monroe, Georgia, from the chain gang, and taken me there. [32]

Q. Going back to your appearance before the judge, were you at that time handed any writing which set forth what you were charged with?

A. No, sir.

Q. Do you remember Petitioner's Exhibit 2, were you handed a copy of that document at that time?

A. No, sir.

Q. Was anything read to you setting forth what you were charged with?

A. No, sir.

Q. Were you asked whether you pled guilty or not guilty?

A. No, sir.

Q. Did you state that you pled guilty to anything?

A. No, sir.

Mr. Thomas: Just a moment. I am going to object to that, your Honor, on the ground that the records of the court would be the best evidence.

The Court: Objection overruled, counsel. The contention here is, for what it is worth, that the records don't show what action transpired. There

(Testimony of Sylvester Middlebrooks, Jr.)
would be no other way to prove what did transpire except by oral testimony.

Q. (By Mr. McTernan): I believe you said you did not have an attorney at that time?

A. That's right, sir.

The Court: We will take a short recess at this time of [33] five minutes.

(A recess was taken.)

The Court: Proceed.

Q. (By Mr. McTernan): After you were returned to your cell, were you taken before a judge at any other time on that day?

A. No, sir.

Q. Or any other day thereafter?

A. No, sir.

The Court: Are those the sentences you are looking at?

Mr. McTernan: Yes.

The Court: Those are the same documents that are included in the return, are they not?

Mr. McTernan: I haven't examined the return.

Mr. Thomas: I believe so, your Honor.

The Court: And a copy of the indictment is in the return, too?

Mr. Thomas: They are all in the return. I haven't had time to check these. I presume they are probably copies.

Mr. McTernan: We were going to offer these,

(Testimony of Sylvester Middlebrooks, Jr.)
your Honor, but we don't want to encumber the record.

The Court: What do you add? There are copies of the sentences for each.

Mr. McTernan: I think the documents we were about to offer are duplicates of the documents attached to the return. [34]

The Court: If you are referring now to the sentence and commitment dated February 8, 1935, Exhibit 2, page 14, 15, 16, 17 and 18 are apparently the same documents as the ones you have.

Mr. McTernan: I think they are, your Honor, and in order to save encumbering the record we can offer those as our documents.

The Court: All right. It is already in evidence by the filing of it, but we will make reference to these pages 14 to 18, inclusive, by reference, 14 to 18 of Exhibit 2, by reference.

The Clerk: Shall I assign them a number, your Honor?

The Court: Yes, assign them a number.

The Clerk: Petitioner's Exhibit 3.

The Court: Any objection to that procedure?

Mr. McTernan: I didn't hear you.

The Court: The return has been filed by the sheriff and is therefore part of the record. Attached to the return as part of Exhibit 2 are pages 14 to 18, inclusive. We will let you offer them in evidence by reference and give them petitioner's numbers in order, 3 to 8, I guess it would be.

(Testimony of Sylvester Middlebrooks, Jr.)

The Clerk: 3, 4, 5, 6 and 7, your Honor.

Mr. McTernan: We so offer them, your Honor.

The Court: All right. Admitted into evidence subject to the general objection stipulated to by counsel. [35]

(The documents referred to were marked Petitioner's Exhibits Nos. 3, 4, 5, 6, 7, and were received in evidence.)

Mr. McTernan: Your Honor, the return sets up the request by the State of Georgia through its governor to the governor of the State of California, which is Exhibit 2, page 6, and there are thereafter a number of documents attached to it, which include the documents already in evidence here as Petitioner's Exhibits 2, 3, 4, 5, 6, and 7.

The Court: Not 2, 3, 4, 5, 6 and 7.

Mr. McTernan: No. 2, also, your Honor.

The Court: Pardon me.

Mr. McTernan: We don't want to encumber the record with a lot of unnecessary documents. I think simply the recognition of that fact, since the return is part of the record, is sufficient.

The Court: That is satisfactory.

Q. (By Mr. McTernan): After you were taken from the jail, Mr. Middlebrooks, in Macon, Georgia, do you recall the name of the place that you were taken to?

A. In 1935?

Q. 1935, yes.

(Testimony of Sylvester Middlebrooks, Jr.)

A. Monroe, Georgia, Warlen County chain gang.

Q. Is that right?

A. Walton County. [36]

Q. Will you describe the place where you were confined at Walton, Georgia? Was it a building?

A. It was a red building, not too large. The white prisoners was on one side and we were on the other side. It was about 40 feet wide, I think, maybe 50 feet, or 60 feet long. The bunks was all very close together, and a lot of us was in there, about 50 or 60 men in the place.

Q. In this place where the 50 or 60 men were, was that broken down into cells, or was it one large area?

A. Just one large area.

Q. What were the approximate dimensions of this area in which the 50 or 60 men were confined?

A. I don't quite understand you there.

Q. How big was this space, Mr. Middlebrooks, how long and how wide, where the 50 or 60 men were?

A. About 40 feet wide and about 50 or 60 feet long.

Q. You say there were bunks in there?

A. Yes.

Q. Were the bunks in tiers or——

A. They were lined up all the way in there.

Q. More than one layer?

A. One up over one.

Q. Were there windows in this area?

(Testimony of Sylvester Middlebrooks, Jr.)

A. There was windows on the side of it. I think one or two windows in the back of it. [37]

Q. How many windows in all?

A. I would say about six, if there were that many. I am not sure.

Q. Were there any toilet facilities in this place?

A. No, sir. The only thing we used was one of these big garbage cans, galvanized cans, that is what we used for a toilet, sitting in the back in the corner, and it leaked and run all over the floor.

Q. How many such cans were there in this space for the 50 or 60 men?

A. Just that one.

Q. Was there a cover over it?

A. No, sir.

Q. How frequently was it emptied?

A. Every morning, I would say. Once a day.

Q. Were the bunks that you described raised off the floor?

A. Yes, sir.

Q. Were any men sleeping on the floor itself or on bedding which was on the floor?

A. No, sir.

Q. Can you describe generally the odors which came from this can?

The Court: Well, the court can take judicial notice of matters of that sort. [38]

Mr. McTernan: Very well.

Q. (By Mr. McTernan): You say this can leaked?

(Testimony of Sylvester Middlebrooks, Jr.)

A. Yes, sir.

Q. How much of the floor, of the area, was covered by what leaked from the can?

A. Well, in the center of the space they have a big stove, and it would come down to that far.

Q. And it would run from the can to the center of the room where the stove was?

A. Yes, sir.

Q. Were you fed in this place, also?

A. No, sir, we wasn't fed in there.

Q. Were you assigned work to do?

A. Yes, sir.

Q. Where did you do the work?

A. Out on the roads.

Q. Will you describe the work which you did?

A. We widened roads, used picks and shovels, widened roads, built highways and built bridges, put pipes under the road.

Q. That is generally the kind of work you and your fellow prisoners were engaged in? What did you personally do?

A. That was the type of work I was doing.

Q. Did you use a pick and shovel? [39]

A. Yes, sir.

Q. Were you shoveling earth or rock or what?

A. Shoveling earth, we shovel rocks, we also load rocks on trucks, big ones, and fill in a mud place, take them big hammers and beat the rocks down to little ones.

Q. You had to break rocks with sledge hammers?

(Testimony of Sylvester Middlebrooks, Jr.)

A. Big hammers.

Q. When you loaded these rocks on trucks, did you have any machines to help you lift them?

A. No, sir.

Q. What hour of the morning did you start work?

A. At the break of day we would go out on the road.

Q. When did you stop work?

A. Dinnertime.

Q. What time of day was that?

A. 12:00 o'clock.

Q. Do you mean at noon?

A. Yes, sir.

Q. How long did you have for your meal at noontime?

A. In the wintertime we had 30 minutes. In the summer we had an hour.

Q. Did you have to work after lunch?

A. Yes, sir.

Q. How long did you work after lunch?

A. We worked until sundown. [40]

Q. I take it, then, that in the winter you had a shorter work day than in the summer?

A. Yes, sir.

Q. Were you fed out there on the job?

A. Yes, sir.

Q. Will you describe the food that you had?

A. We had peas, beans, greens, you know, worms in them, spiders, and everything like that in them,

(Testimony of Sylvester Middlebrooks, Jr.)
it was never clean, the bread was mushy and all like that.

Q. Will you describe whether there was any vermin or foreign matter in the food? Do you know what I mean?

A. No. Come again with that one.

Q. You say you were dished up some beans. Was there anything in the dish besides beans?

A. Yes, sir. You found bugs, spiders, rat manure, all like that was in them.

Q. Was there anything in the bread besides bread?

A. I don't remember any bugs in the bread, I never seen any.

Q. How many meals did you get a day?

A. Three.

Q. Does your testimony concerning the foreign matter in the food apply to each meal each day?

A. Yes, sir, you could always find something in the food. [41]

Q. What effect did this food have on your health, if any?

A. It makes you sick in the stomach, you vomit, and all like that.

Q. Did you see other men suffering the same way?

A. Yes, sir.

Q. Going back to the work you did, I believe you said you did this work in the summertime, as well as in the wintertime?

(Testimony of Sylvester Middlebrooks, Jr.)

A. Yes, sir.

Q. Can you describe the pace at which you worked, whether it was fast or slow or medium?

A. It was fast, they were always rushing you.

Q. Who is "they"?

A. The guards.

Q. How did they rush you?

A. They would curse you and call you all kinds of names.

Q. Did they have any weapons?

A. Yes, sir, they all carried a gun.

Q. Anything else?

A. Sticks.

Q. Did you ever see the guards — first, did the guards ever use their guns or their sticks on you?

A. I have been beaten up several times. [42]

Q. With what?

A. Sticks. I have been kicked, slapped around, too.

Q. By whom?

A. The guards, also the warden.

Q. Was that in the prison itself or out on the road?

A. Out on the roads.

Q. Did you see this happen to other men?

A. Yes, sir.

Q. Other Negro men?

A. Yes, sir.

Q. Other white men?

(Testimony of Sylvester Middlebrooks, Jr.)

A. I seen it happen to just two white fellows there.

Q. Did you Negro men work close by where the white men worked?

A. Yes, sir.

Q. You say these men made you work fast, they rushed you, by hitting you and urging you to work fast. What effect did this have on the men who worked around you?

A. Well, all of us would fall out at times.

Q. Did you ever fall out as a result of this?

A. Yes, sir.

Q. How many times, do you recall?

A. I can't even count them.

Q. When you say "fall out" what do you mean by that?

A. You are overheated, it is hot, and you can't go no [43] further so you just fall out.

Q. On these times when you fell out did you lose consciousness or did you remain conscious?

A. At times. Not all the time, but at times you do.

Q. Were there any doctors or nurses there with the road gang when you were working?

A. No, sir, there was none.

Q. Did these men who fell out in the manner that you described receive any medical treatment that you could see?

A. No, sir; you just lay out there.

(Testimony of Sylvester Middlebrooks, Jr.)

Q. What did the guards do, if anything, when the men fell out?

A. He would kick and knock some of them around trying to make them go on anyway.

Q. Did this happen to you?

A. Yes, sir.

Q. While you were working did you have any manacles or chains on you?

A. I had double shackles on.

Q. Will you describe double shackles, please?

A. It is a cuff on each leg, with a chain running from that one to the other.

Q. This cuff is made of what?

A. Metal.

Q. A metal cuff on each leg connected by a chain? [44]

A. Yes, sir.

Q. About how long was the chain?

A. About like that (indicating).

The Court: Indicating about 14, 16 inches.

Mr. McTernan: Thank you, your Honor.

The Witness: Yes.

Q. (By Mr. McTernan): Do you know what a pict is? A. Yes.

Q. What is it?

A. It has got a round cuff and it has got a sharp point sticking out each way, over the toe of your shoe and behind.

Q. How long are those points?

A. About 10 inches.

(Testimony of Sylvester Middlebrooks, Jr.)

Q. And they are made of what?

A. Metal, iron.

Q. Where are they placed?

A. On your legs.

Q. At the ankles? A. Yes, sir.

Q. Did you ever have those put on you?

A. Yes, sir.

Q. While you were working on the road gang?

A. Yes, sir.

Q. How often did you have picts put on your legs? [45] A. Quite a few times.

Q. Were they put on on special occasions?

A. Yes, sir.

Q. For what reason?

A. Well, if you aren't working to suit them people, you can't satisfy them, then they will slap those picts on you. If they figure you are going to run away they put those picts on you.

Q. What do those picts do to your legs or feet, if anything?

A. It makes it sore down there. It is supposed to trip you if you try to run away.

Q. Going back to these quarters in the prison, will you state whether or not there were any rats or other wild life in the prison?

A. There was rats, roaches, and chinches in the place.

Q. What was the last thing you said?

A. Chinches, little bitty red bugs.

Q. Are they the same as bedbugs?

(Testimony of Sylvester Middlebrooks, Jr.)

A. Yes, the same thing; they bite you.

Q. Did you see these yourself there in the prison? A. Yes, sir; yes, sir.

Q. In this area that you describe?

A. The chinches are always in the bed, little cots.

Q. Did you see these things continually and regularly [46] while you were there, or only on occasion? A. You see them every day.

Q. Will you describe the nature of the mattresses on the bunks?

A. From the time I went there until the time I ran away from there I had the same mattress, the same two blankets, and the same pillow. It was never changed.

Q. Did you have any sheets?

A. No sheets, no pillow cases.

Q. Was this mattress ever cleaned?

A. No, sir.

Q. Were the blankets ever cleaned?

A. No, sir.

Q. Was the pillow ever cleaned?

A. None of it cleaned.

Q. Was it clean when you were given this mattress, pillow and blankets, were they clean at that time?

A. They were clean then. You could see where they had been soiled, but they were cleaned when they give them to you then.

Q. How long did you use the same bedding?

(Testimony of Sylvester Middlebrooks, Jr.)

Q. (By Mr. McTernan): With your arms stretched out in front of you? A. Yes, sir.

Q. Were your wrists in the holes in the stock, also?

A. This thing clamps right across your wrist like that (indicating).

Q. Was there any board over any portion of your legs other than the stock that was over your ankles?

A. Yes, sir, he put a 2 by 4 right across your knees, it was wired down on one side and he put his feet up on one side and press your leg down as far as he could like that, and then he wired it back on that side and leaves you there for one hour.

Q. So this board that was wired across your knees pressed your knees down towards the ground, is that right? A. Yes.

Q. Against the joint rather than with the joint?

A. Yes, sir.

Q. Were you ever placed in that stock? [50]

A. Yes, sir.

Q. More than once?

A. I was in it six times with this thing across it, and I don't know how many times before he start doing that.

Q. What was the reason that men were put in the stock? A. About the work.

Q. You mean their work was not satisfactory?

A. Yes, sir, he would put you on that stock.

Q. On the occasions that you were in the stock

(Testimony of Sylvester Middlebrooks, Jr.)

what was the shortest time you ever sat in the stock?

A. One hour, that was the shortest and the longest.

Q. One what? A. One hour.

Q. One hour? A. Yes.

Q. Did you see men sitting in the stock for longer periods of time?

A. No, sir, I haven't seen any longer than that.

Q. What was the effect of sitting in the stock with the board wired over your knees upon your ability to walk when you were released?

A. You cannot walk when you get up from there, when he takes you off of it. They drag you back into the bullpen and some of the men will take you and put you on your bunk.

Q. The bullpen is this area you described where the [51] bunks were where you lived? A. Yes.

Q. Have you seen other men in the stocks?

A. You can't see them, but they takes them out there and drags them back in.

Q. Have you ever seen any man die after being in that stock?

A. There was one colored boy they drug him back in there and we put him in his bed, and he stayed there two weeks and that is where he died.

Q. At the times that you were in the stock and then dragged out again, did you receive any medical attention of any kind for your legs?

A. No, sir.

Q. Or for any other portion of your body?

(Testimony of Sylvester Middlebrooks, Jr.)

A. No, sir.

Q. What about this man that was dragged out and spent two weeks in his bunk and died, did he get any medical attention?

A. They had a doctor down there, I don't know how many times he was there.

Q. Did they have any recreation facilities there at the prison? A. None whatsoever.

Q. Did they have any church services? [52]

A. No, sir.

Q. What did the men do when they got back to the bullpen from out on the road gang?

A. Stayed in the bullpen, played cards if they wanted to, lay down, anything.

Q. Did they have any church services at the prison? A. No, sir.

Q. Did they have a thing there at that prison called the sweat box? A. Yes, sir.

Q. Describe to the court what the sweat box was.

A. It is a small building, it is made very close, that have little sections in it, and they put you in there with no clothes on and give you two blankets and bread and water.

Q. This is a separate building away from the bullpen? A. Yes, sir.

Q. You say it was subdivided into small sections?

A. Yes.

Q. Can you give us approximately how long and how wide those sections were?

(Testimony of Sylvester Middlebrooks, Jr.)

A. About six feet, I imagine, long, and three feet wide.

Q. How high were they?

A. I don't know exactly how high it is, because it is dark in there, and you can't see. [53]

Q. Was it higher than a man's head?

A. Yes, sir.

Q. There is no light in there at all?

A. No, sir.

Q. Was there any heat in this building?

A. No, sir.

Q. Were you ever put in the sweat box?

A. Yes, sir.

Q. How many times?

A. I don't know exactly how many times I have been in it, but I have stayed in there as much as seven days.

Q. Seven days consecutively? A. Yes, sir.

Q. Have you known of instances of men who have stayed there longer than seven days at a time?

A. Yes, sir.

Q. What is the longest you know of any man staying in a sweat box at one time?

A. Fourteen days.

Q. Were men put in there in winter?

A. Yes, sir.

Q. When they were put in there in the winter-time were their clothes taken off them?

A. Yes, sir.

Q. And given the same two blankets? [54]

(Testimony of Sylvester Middlebrooks, Jr.)

A. Yes, sir.

Q. Were they woolen or cotton blankets?

A. Woolen ones.

Q. Were there any toilet facilities in the sweat box? A. No, sir.

Q. Any at all? A. They give you a pail.

Q. A pail? A. Yes.

Q. That is there in the same room with you?

A. Same room with you.

Q. Were you put in this sweat box in the summertime, also? A. Yes, sir.

Q. Was anything used that you would know of to cool off that sweat box during the summer months in Georgia? A. No, sir.

Q. Incidentally, when you worked in the road gang during the summertime in Georgia did you work out under the sun?

A. Yes, sir, right out in the sun.

Q. Did you have any rest periods during the morning or the afternoon? A. No, sir.

Q. In the sweat box what food did you receive? [55]

A. They gave you bread and water.

Q. How many times a day?

A. Three times a day.

Q. Any variation in that diet from one day to the other?

A. Every third day I think they give you a meal, every third day.

(Testimony of Sylvester Middlebrooks, Jr.)

Q. Do you mean a meal similar to the ones you received out on the road?

A. Yes, sir, the same thing.

Q. How many men in each one of the subdivisions of the sweat box, sections, that you describe?

A. If I am not mistaken they could put six or eight in it, I believe.

Q. You say that the sweat box building was divided into sections that measured 6 feet by 3 feet?

A. Yes, sir.

Q. Did they put more than one man in one of those sections?

A. Just one man in one of the little sections.

Q. Did he have any contact with his fellow prisoners or with anybody during the time he was in there? A. No, sir, no one.

Q. Is this what you call solitary?

A. Yes, sir. [56]

Q. What clothing did you wear there in the prison? A. We wore those stripes.

Q. What are they?

A. The pants and a jacket and underwear.

Q. What do the stripes look like? Black and white stripes? A. Yes.

Q. Horizontal?

A. They are circular, goes around, mostly.

Q. Do you know whether they were made of wool or cotton?

A. No, I don't remember what they were made out of.

(Testimony of Sylvester Middlebrooks, Jr.)

Q. Did you get any heavier clothing issued to you in the wintertime?

A. We only get this heavy underwear.

Q. You described a man dying after having been put in the stock. Did you see any prisoners die after being beaten?

A. No, sir, I haven't seen any die.

Q. You said earlier that the guards were armed with guns and sometimes with wooden clubs. Were they ever armed with anything else besides that?

A. No, sir. I only seen them with the sticks and the guns. .

Q. Did you ever see any guards with leather whips?

A. Yes, sir; some men they used to take them down to [57] the barn and handcuff them up on a pole there and whip them.

Q. Did this ever happen to you?

A. Yes, sir.

Q. More than once? A. Yes, sir.

Q. How many times?

A. I don't remember the times.

Q. Why was that done to you? Had you done something which the guards didn't like?

A. It is always on work. You couldn't never satisfy them, and especially the warden, and he was out on the road at all times.

Q. By the work, you mean the work on the road gang? A. Yes, sir.

Q. When you were whipped there were you

(Testimony of Sylvester Middlebrooks, Jr.)
whipped through your clothing or on your bare skin?

A. They take you down to that barn and you pull off your shirt.

Q. And then they strap you up as you have described? A. Yes, sir.

Q. Did you run away from this chain gang?

A. Yes, sir.

Q. When? A. In 1937 I ran away.

Q. What month, do you recall? [58]

A. If I am not mistaken I think it was in March.

Q. March of 1937?

A. I think that is what it was.

Q. Where did you go?

A. I went to South Carolina.

Q. Did you get in some trouble there in South Carolina? A. Yes, sir, I did.

Q. What trouble did you get into?

A. That was a house-breaking, grand larceny they called it.

Q. Were you arrested? A. Yes, sir.

Q. Were you sent to jail?

A. I was sentenced to eighteen months' sentence in the chain gang there.

Q. What kind of a house did you break into there?

A. A dwelling house. People lived in it.

Q. Somebody's residence?

A. People lived in it.

Q. What did you go in there for?

(Testimony of Sylvester Middlebrooks, Jr.)

A. Because I was hungry and I needed clothes. I went there and knocked on the door, I was going to ask for some food, maybe a pair of overalls and shirt. There wasn't nobody there, so I just went in it.

Q. Did you serve in the South Carolina chain gang, also? [59] A. Yes, sir.

Q. Did you run away from there?

A. No, sir.

Q. You served your sentence out?

A. Yes, sir.

Q. After you finished your sentence in South Carolina, what happened to you?

A. They locked me up in jail, and I think I stayed there for a week, then the warden and the guard came from Monroe, Georgia, and taken me back to the chain gang.

Q. Did you go back to the same place in Georgia you had been in Walton County?

A. Yes, sir, the same place.

Q. How long did you serve there at that time?

A. If I am not mistaken it was about a year and thirteen days. I am not too sure of that. But I know it was a little better than a year.

Q. At the time you were brought back to Georgia in—when was it?

A. 1938, I think it was.

Q. Were you brought before a judge again?

A. No, sir.

Q. Just taken right back to the prison?

(Testimony of Sylvester Middlebrooks, Jr.)

A. Straight to the chain gang.

Q. After you had been there about a year or so what [60] happened next?

A. I escaped again.

Q. Where did you go this time?

A. New York.

Q. Did you get in any more trouble after that?

A. No, sir.

Q. Did you go into the Army?

A. I registered for the draft and later I was inducted, and later I went A.W.O.L. there.

The Court: When were you inducted?

The Witness: In 1942, April 23rd, I believe it.

Q. (By Mr. McTernan): Where were you stationed when you went A.W.O.L.?

A. Fort Dix, New Jersey.

The Court: When did you go A.W.O.L.?

The Witness: I think it was August, 1942.

The Court: How long were you A.W.O.L.?

The Witness: Three years, six months and twenty-six days, I think it was. I am not too sure.

The Court: When were you picked up?

The Witness: March 8, 1946.

The Court: When were you sentenced by a court-martial?

The Witness: April 3, 1946, your Honor.

The Court: How long?

The Witness: Fifteen years, dishonorable discharge. [61]

The Court: How much time did you serve?

(Testimony of Sylvester Middlebrooks, Jr.)

The Witness: I served three years, five months and thirteen days, I think.

The Court: You were in New York from 1938 to 1942?

The Witness: No, sir. I escaped in 1939, July 13th.

The Court: So you were in New York from what month in 1939?

The Witness: July.

The Court: July, '39, until you were inducted about April of '42?

The Witness: Yes, sir.

The Court: That is about the only period of time that you weren't getting into trouble?

The Witness: Yes. I only did this in Georgia and South Carolina, that is the only crime I committed.

The Court: You went A.W.O.L. from the Army?

The Witness: Yes, sir.

The Court: What did you do that for?

The Witness: My mother was sick and I wanted to go home and they wouldn't give me any furlough.

The Court: Didn't you go back to Georgia after you went A.W.O.L.?

The Witness: No, sir, I didn't go back.

The Court: Was your mother in Georgia?

The Witness: Yes, sir, she was. [62]

The Court: In other words, you didn't go A.W.O.L. to see your mother?

(Testimony of Sylvester Middlebrooks, Jr.)

The Witness: I did. They didn't give me a furlough. When I went in there they are supposed to give you seven to fourteen or fifteen days, and I didn't get that, and I tried to get a furlough, and I didn't get that, so my mother was sick, and I was intending to go back there, but I thought about what they would do to me, so I didn't go back.

The Court: Nor did you go back to the Army?

The Witness: Yes, I went back to the Army once, but my company was gone, and there was nobody there, so I just left again. I turned in.

The Court: What place did you go back to?

The Witness: Fort Dix.

The Court: Were you in uniform at the time?

The Witness: Yes, sir.

The Court: You went on back to Fort Dix?

The Witness: Yes, sir, I went back and turned in to the provost marshal.

The Court: Why didn't they hold you at that time?

The Witness: They did, they had me down there in what they call a replacement center.

The Court: How long had that been after you went A.W.O.L.?

The Witness: I was only away nine days the first time I went and I came back. [63]

The Court: By that time your company was gone?

The Witness: Yes, my company was gone.

The Court: They put you in a replacement center?

(Testimony of Sylvester Middlebrooks, Jr.)

The Witness: Yes, sir.

The Court: How long did you stay then before you left Fort Dix again?

The Witness: I don't remember exactly.

The Court: Well, was it a short time or long time? I know you can't remember exactly.

The Witness: It wasn't too long.

The Court: Did you stay around a week or two, or were you there several months before you went A.W.O.L. again?

The Witness: I would put it around three to four months. It could have been a little better.

The Court: You think it was three or four months?

The Witness: Weeks.

The Court: All right.

Q. (By Mr. McTernan): It was after you went A.W.O.L. the second time that you were court-martialed, is that right? A. Yes, sir.

Q. And sentenced to Camp Cooke?

A. No, sir. When they sentence you they say something about the reviewing authorities can send you anywhere they want to. So I was sent to Stoneville, New York, a place called Green Haven. I served seventeen months there, and then [64] I was sent out here to Camp Cooke.

Q. Did you escape from any of these Army camps? A. No, sir.

Q. Did you have any trouble of any kind while you were at either of those Army camps?

(Testimony of Sylvester Middlebrooks, Jr.)

A. No, sir, I didn't have any trouble.

Q. Incidentally, when you were in the Georgia prison in the chain gang did you receive any training in a trade? A. No, sir.

Q. Did you receive any training in a trade while you were in the Army prison?

A. Yes, sir, I learned tailoring, and also went to school.

The Court: How far did you get in school in the Army camp?

The Witness: I went up to the tenth grade, but I also got an eighth grade diploma. I stopped in the tenth and went in the tailoring trade.

The Court: It is 12:00 o'clock. Recess until 1:30. Is that satisfactory?

Mr. McTernan: Satisfactory to me, your Honor.

Mr. Thomas: Satisfactory.

The Court: All right.

(Whereupon at 12:00 o'clock noon a recess was taken until 1:30 o'clock p.m. of the same day.) [65]

Los Angeles, California, Tuesday, December 20, 1949. 1:30 P.M.

SYLVESTER MIDDLEBROOKS, JR.

the petitioner herein, called as a witness in his own behalf, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. McTernan:

Q. I just want to go back over a couple of things I overlooked. You described the shackles that were applied to you when you worked on the road gang, chain gang? A. Yes, sir.

Q. Were those shackles removed when you were through with your day's work?

A. No, sir; we slept in them.

Q. You slept in them? A. Yes, sir.

Q. Were you at any time during the course of the day chained to any other prisoner?

A. No, sir.

Q. Each individual prisoner was shackled, is that the idea? A. Yes.

The Court: Did every prisoner in the chain gang have shackles on them? [66]

The Witness: Yes, sir, when I was there.

The Court: Every one of them?

The Witness: Yes.

The Court: And they all slept in them?

The Witness: Yes, sir.

(Testimony of Sylvester Middlebrooks, Jr.)

Q. (By Mr. McTernan): At any time during your stay in the bullpen at the Walton prison, was that bullpen ever invaded by outsiders unconnected with the prison?

A. No, sir. Only except this mob came down there.

Q. When did that happen? A. 1936.

Q. What time of day? A. It was night.

Q. What happened?

A. Two of them came inside and flashed a light in every one of our faces. The fellow they were looking for was not there, and he says, "We ought to string up all of the so-and-so's."

Q. Just say what he said.

A. "All of the black sons-of-bitches."

Mr. Thomas: I am going to object to that, your Honor, on the ground there is no identity of the persons involved, too remote in time, incompetent, irrelevant and immaterial, and hearsay.

The Court: Objection overruled. [67]

Q. (By Mr. McTernan): Did you see these two white men who did this? A. Yes, sir.

Q. Had you ever seen them before?

A. No, sir.

Q. Do you have any basis of knowing whether they were connected with the prison?

A. No, sir, I don't.

Q. Were there any of the prison guards with them?

A. Only the night guard was with them.

(Testimony of Sylvester Middlebrooks, Jr.)

Q. He went with them?

A. He came inside, he unlocked the door and let them in.

Q. Was the guard present when this statement about stringing up you black so-and-so's was made?

A. Yes, sir.

Q. Since there is so much in the testimony with reference to escapes on your part, Mr. Middlebrooks, I want to ask you with reference to the conditions in this training school. In what kind of quarters were you confined in that training school?

A. Up in a dormitory.

The Court: Let's save some time on that. There is no contention here that he be sent back to the training school.

Mr. McTernan: That is correct, your Honor. [68]

The Court: The escapes of a boy of thirteen or fifteen I don't take as being much evidence one way or the other.

Mr. McTernan: Very well. I withdraw the question. You may cross-examine.

Mr. Thomas: At this time, your Honor, on behalf of the respondent I move to strike the evidence of the witness on the following grounds: The evidence is incompetent, irrelevant and immaterial;

(2) Neither the petition requesting a writ, nor counsel's opening statement, states sufficient facts to constitute a cause of action which would warrant the granting of a writ;

(3) That the proffered testimony raises issues

(Testimony of Sylvester Middlebrooks, Jr.)
which are beyond the scope of the jurisdiction of this Court.

The Court: What was the first one? The second one was no cause of action stated, and the third that it is beyond the jurisdiction of the court. What was the first one?

Mr. Thomas: Incompetent, irrelevant and immaterial, your Honor.

The Court: The objection will be overruled, subject to the motion which the Court is taking under submission.

Mr. Thomas: Is the motion taken under submission, your Honor?

The Court: I could take it under submission, but in view [69] of your—I will take it under submission, too, then. Set aside my ruling and I will take it under submission along with the opening objection. I had in mind that the opening objection was broad enough to cover everything. But to save your record I will take this motion under submission, also, and set aside my ruling on it.

Mr. Thomas: No questions.

Mr. McTernan: That is all.

The Court: Step down.

Mr. McTernan: Your Honor, we had a witness here. He stepped out of the court room. I am sure he will be available in just a moment. May I be excused to go to see if I can find him?

The Court: Yes.

Mr. Thomas: May I have my motion read again, please?

(The motion made by Mr. Thomas was read by the reporter.)

Mr. McTernan: Mr. Conkle, will you take the stand, please?

HORACE B. CONKLE

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Horace B. Conkle. [70]

Direct Examination

By Mr. McTernan:

Q. Where do you live? A. Bams——

Mr. Thomas: Just a moment, please. At this time I would like to renew the motion heretofore made with respect to the first witness' testimony, on the ground that neither the petition nor counsel's opening statement states a cause of action which would warrant the granting of a writ.

The Court: The objection is taken under submission, and by a stipulation of counsel it may go to the entire line of testimony.

Mr. McTernan: So stipulated.

Q. (By Mr. McTernan): Where do you live now, Mr. Conkle?

(Testimony of Horace B. Conkle.)

A. Bams Auto Court, Santa Barbara.

Q. Were you ever in the state of Georgia?

A. Yes.

Q. Were you convicted of a crime of burglary in Georgia? A. Yes.

Q. What year? A. 1934.

Q. Following your conviction and sentence did you serve time in a prison in the State of Georgia?

A. Yes.

The Court: Now, can't we save time, or can we? In view [71] of the fact that there was no cross-examination of the last witness, and I take it this is cumulative, can't we stipulate that this witness' testimony would portray substantially the same acts as shown by the petitioner Middlebrooks, or do you have other matters, Mr. McTernan?

Mr. McTernan: If you just give me a moment to go over my notes, I think I can stipulate to that, your Honor. Excuse me just a second.

The Court: On second thought, maybe you had better sketch through some of it if it is similar matter. I am not too concerned about the food. We all know food in jails isn't good. But the conduct, how prisoners were treated, the style of leg irons they wore, when they wore them, and sanitary conditions.

Mr. McTernan: Very well. If your Honor will permit an interruption, I neglected to ask that the appearance of Miss Murray of Santa Barbara be entered as counsel of record.

(Testimony of Horace B. Conkle.)

The Court: What is the first name?

Mr. McTernan: Miss Murray. Elizabeth Murray.

The Court: She will appear of record as attorney for the petitioner.

Q. (By Mr. McTernan): In what prison in Georgia were you confined following your sentence, Mr. Conkle?

A. Colquitt County, Georgia.

Q. In what part of the state is that? [72]

A. In the southern part.

Q. Incidentally, are you familiar with the location of Walton County, Georgia?

A. Yes. I might go so far as to say I am familiar with almost every county in the State of Georgia.

Q. Is Walton County also in the southern part of the state?

A. More southern than any place else; about the southern central, something like that.

Q. Will you describe briefly the nature of the building in which you were confined in the Colquitt County prison?

A. It was a wooden barracks type building with a hallway splitting the colored side from the white side, and each side had three windows in it.

Q. How big was the area on each side of the hallway?

A. Well, both sides were the same size. I would say it was about 16 by 25 or 16 by 35 rooms, there was two rooms that big.

(Testimony of Horace B. Conkle.)

Q. I take it that you and the other white prisoners were in one side of that hallway there and the Negro prisoners were on the other side, is that right? A. That's right.

Q. Will you tell approximately the number of Negro prisoners who were confined on their side?

A. Well, this chain gang that I was on was known in [73] chain gang circles as the nigger chain gang. In other words, I mean by that the colored boys predominated. There was about one hundred, average of one hundred fifteen, twenty men in this particular camp all the time, and it averaged from, I would say from eleven to twenty-five white men. The rest of them were colored.

The Court: All in one building?

The Witness: Yes, sir.

Q. (By Mr. McTernan): In other words, there were about ten to twenty-five white men on one side of the hallway and about one hundred ten Negro men on the other side?

A. No. I guess it would run close to 75 or 80 colored.

Q. On one side of the building?

A. On one side.

Q. And——

A. On the other side was the white boys, which ran from eleven to twenty-five. And there was an average of about, like I say, 115, 120 men there at all times.

Q. When you say 115 to 120, you are talking

(Testimony of Horace B. Conkle.)

about the whole gang, Negro and white together?

A. Yes. You see, where the discrepancy in that comes is the trusties slept in a building to themselves, and there was always from, I would say, 16 to 20 trusties.

Q. Can you describe briefly the sleeping accommodations on the Negro side of this barracks? [74]

A. Well, yes. They had bunks, two- and three-tiered bunks stacked up like that, and they were in line, the head of one bunk would jam the foot of another like that, and they were in lines about, I would say, not more than 30 inches apart, anyway, they had to be very close to get enough bunks in there for all the fellows.

Q. As I get the picture, the head of one bunk was against the foot of the next? A. Yes.

Q. In rows, and there were two rows about 30 inches apart?

A. There was several rows, the rows was 30 inches apart, and I guess there was four or five rows of them. They ran the length of the building.

Q. Will you describe the sanitary facilities in that room where the Negro prisoners were kept?

A. They had two toilet bowls in there and a shower. Of course, this shower, you had to practically stand on the toilet bowls in order to take a shower, when the shower would run, because there was such a limited amount of space there.

Q. Were the toilet bowls equipped with running water? A. Yes.

(Testimony of Horace B. Conkle.)

Q. What kind of heating facilities did they have.

A. They had oil drums, 50-gallon oil drums with a stovepipe in it and a door cut in the side. They used wood [75] for fuel.

Q. How many of such stoves on the Negro side?

A. There was one on the white side and one on the colored side.

Q. Were the prisoners chained? A. Yes.

Q. How?

A. Most of them wore double shacks and an upright.

Q. Describe that, will you?

A. An upright goes from the center of your ankle shack between your legs up to your belt.

Q. In back?

A. In back. And it is used to put the men on building chain at night. When you come in at night there is a guard by the door here and a guard by the door here, and each one of them is holding the end of a chain. Well, this chain, there is a big ring on your upright, and you go on that chain according to your number, and these chains go in a loop down the aisles of these bunks, so that the men sleeping on this side and the men sleeping on this side in this line of bunks can be on that building chain and still be in their bunk.

The Court: What is this upright, a piece of metal?

(Testimony of Horace B. Conkle.)

The Witness: No. It is a chain, too, your Honor.

The Court: From your ankle shackle to your belt? [76]

The Witness: Yes, sir.

Q. (By Mr. McTernan): Did the prisoners wear the ankle shackles and the upright at all times?

A. Sure, there was no way to get it loose. It was riveted—the shacks was riveted to your ankles and the upright was riveted to the center of the cross chain.

Q. On the ankle shackle? A. Yes.

Q. When they returned from working on the road gang to the barracks that you have described, am I correct in understanding that at that time they were put on a chain which was fastened to an upright in the barracks?

A. No. I am sorry, I never did finish explaining that. You go on the chain here, and on this side, the two ends, you see here is a loop down here at the end of the barracks, and after all the men get on the chain on the side of it, they get on in the position to their bunk, then they lock the two ends together at this end with a padlock, and they stay that way all night.

Q. Let me ask you this question: Am I correct in understanding that there runs down between the rows of bunks a chain, and that when the men come in from work they are attached to that chain in the order in which their bunks are laid out?

(Testimony of Horace B. Conkle.)

A. That's right. [77]

Q. When that chain is locked they remain in both the shackle chain and the upright chain and this additional chain between the bunks while they are in there asleep, is that right?

A. That is right, that is what the upright chain is for. Like I said, you take it loose from your belt, it has a big ring on the end of it, and they run the building chain through that ring like that, and then you work your chain down to your bunk, and that is where you are. If you have to get up and be excused during the night, then you have to wake the other boys up in order for them to go down the chain with you, because you can't pass them.

Q. If you wanted to get up during the night to go to the toilet you would have to wake up everybody else in the row in order to get down the chain?

A. Between you and the toilet.

Q. Did they ever use, in your experience, the ball and chain in this prison? A. Excuse me?

Q. In this Colquitt County prison did they use the ball and chain?

A. Yes, I have seen ball and chains used in several different ways down there. I have seen them with it around their neck, a chain shack around their neck and a ball at the end of a chain. I have also seen them use it with a ball [78] at the end of the chain and a shack to their ankle.

Q. When you say "seen them," are you referring to white prisoners or Negro prisoners?

(Testimony of Horace B. Conkle.)

A. Well, I can't say there was no discrimination, but there was very little discrimination. If a white person was—if the guards felt he was going to run or they was making it so tough for him that he was going to do something out of the ordinary, they would throw it on him just as quick as they would the colored boy.

Q. This house chain that you refer to, the one that you are on when you come into your bunk, was that used for the Negro prisoners at your barracks also? A. Sure.

Mr. McTernan: I understand your Honor is not interested in the food aspect of it. I just would like to go into one small part of it.

The Court: It won't hurt any.

Q. (By Mr. McTernan): Are you familiar with the food given to the men at this prison when you were there? A. Yes.

Q. Did you ever see prisoners become sick after eating this food?

A. That was a common occurrence.

Q. What was the nature of their illness as far as you could observe it? [79]

A. As far as I could observe it and as far as I experienced it, you became nauseated at your stomach. A lot of times it developed into dysentery. Especially in the summertime in the hottest part of summer, the fellows would eat at noontime and then along in the middle of the afternoon, after they had worked from after they ate on, they would start

(Testimony of Horace B. Conkle.)

falling out from vomiting, and sour stomach, I guess you would call it.

Q. Were you and your fellow prisoners at this Colquitt County barracks working on the roads?

A. Yes.

Q. And will you describe generally the nature of that work?

A. Well, working on State highways and secondary roads and farm-to-market roads. The State highways, we were usually paving them or top-soiling them, getting ready to be paved; and on the secondary roads and farm-to-market roads, which were the County's sole obligation as far as roads were concerned, we filled in and built up shoulders and so forth.

Q. What tools, if any, did you work with?

A. We used picks, shovels, axes, sledge hammers.

Q. What was the approximate weight of the sledge hammer you used?

A. From 9 to 12 pounds.

Q. What did you use them for? [80]

A. For breaking rock, used them for driving stakes when we was putting in culverts.

Q. Did you do this work winter and summer?

A. Winter and summer.

Q. What were your hours?

A. We worked, in chain-gang parlance, from can't to can't. We couldn't see when we went to work and we couldn't see when we quit.

Q. From daybreak to nightfall?

(Testimony of Horace B. Conkle.)

A. That's right.

Q. Were you chained in the fashion you described while you worked, also?

A. Yes, except we wasn't on a building chain, or anything.

Q. Were prisoners in your prison required to wear picts? A. Yes, some of them.

Q. Did you hear Mr. Middlebrooks testify concerning the nature of a pict and how it is put on, this morning? A. Yes.

Q. Does that accord substantially with your recollection as to how it is done?

A. That's right.

Q. Have you seen men punished in this prison where you were confined? [81] A. Oh, yes.

Q. Will you describe the infractions, whatever the causes for the punishment were, for what reasons were they punished?

A. On a lot of occasions there didn't have to be any reason; it would just be personal malice between the guard and the prisoner, but——

Q. Mr. Conkle, that is a conclusion on your part. If you can describe what happened, it would be more helpful to the court.

A. Well, the punishments were always attributed to——

The Court: What were the punishments?

A. (Continuing): ——not doing enough work or not doing it right, or not doing it fast enough.

In this particular gang they used the strap, used the water cure, and used the sweat box.

(Testimony of Horace B. Conkle.)

Q. (By Mr. McTernan): You say the causes for this punishment were not doing enough work or not doing it well enough, or not doing it fast enough. Is that what the guards said to the prisoners at the time the punishment was inflicted?

A. That is right.

Q. When you say they used the strap, what do you mean? Describe it, please.

A. They have straps about three inches wide and about [82] three feet long on a handle cut in approximately the shape of a razor strap handle. I have seen this, this is not hearsay, I have seen them on the road, have a couple of trusties grab a man and throw him across a log, and then have the biggest other trusty that they had—well, he didn't necessarily have to be a trusty, he would just be a prisoner—have him whip the man.

Q. With the straps?

A. With those straps. And I have seen men when the seat of their pants would be completely filled with blood from those beatings.

Q. These men that you saw beaten with straps, were they beaten through their clothing or was their clothing taken off?

A. Through their clothing on the road.

Q. Is it done differently back in the barracks?

A. Yes. They always made them drop their trousers when they whipped them in camp.

Q. Were the guards equipped with these straps?

A. Yes.

(Testimony of Horace B. Conkle.)

Q. Did they use them in the fashion that you describe?

A. No, they didn't use them, they always had a prisoner use them. They were too lazy to use them.

Q. You referred to punishment known as the water cure, what you describe as the water cure. Will you describe that [83] to the court?

A. When they gave you the water cure, they handcuffed you, put your hands down over your knees in this fashion (indicating).

Q. In front of your knees?

A. In front of your knees that way, and then ran an iron pipe underneath your kneecaps.

Q. Underneath your knees and over your forearm?

A. Like this (indicating), and then they would run a pipe through there (indicating).

The Court: The witness is demonstrating a position with his knees pulled to his chest, his heels pulled in toward his buttocks, and his hands clasped over his shin bones.

Mr. McTernan: And indicating a pipe that was passed over his elbows and under his knees. Is that correct?

The Witness: That is right.

Q. (By Mr. McTernan): After the prisoner was in that position, what was done?

A. They had the trusties—he had all his clothes off, of course, and they had the trusties hold him underneath the shower spigot with his head directly

(Testimony of Horace B. Conkle.)

under it, and turned the water on full force. You couldn't move to right or left, and you just stayed there and swallowed water until, what we said, drowned, we became unconscious. [84]

Q. Then what was done?

A. They would roll you out from under it and when you came to they would roll you back under it if you didn't do what—if you didn't say what they wanted you to say.

Q. Have you seen men taken out from under that and put back again more than once?

A. I have had it done to me. I haven't seen it.

Q. How many times were you rolled out and back again? A. Seven times.

Q. You referred to the sweat box. Did you hear Mr. Middlebrooks testify concerning the sweat box at Walton prison? A. Yes.

Q. This morning? A. Yes.

Q. Is your testimony concerning the nature of the sweat box substantially the same as his?

A. It is substantially the same. The only thing is we didn't have sections in the sweat box at our camp. We just had a 4 by 6 box without any toilet facilities whatever, and they might put you in there with your clothes on or they might put you in there with them off, but they didn't give you any blankets or anything.

Q. Were you ever in the sweat box?

A. Yes. [85]

(Testimony of Horace B. Conkle.)

Q. What do the prisoners do for elimination purposes without toilet facilities?

A. Right on the floor.

Q. For what periods of times were you kept in the sweat box? A. I was in once for 48 hours.

Q. Was that the longest you were in?

A. Yes.

Q. Do you know of other cases that were longer?

A. I didn't know of anybody staying in there over 72 hours.

The Court: No windows of any kind, no ventilation of any kind?

The Witness: No, sir, your Honor, that is just what I was going to say. That is the reason, it was self-preservation, the reason they didn't keep them in there any longer than 72 hours, because a man would have died in there. In fact, I saw them pull one man out of the sweat box dead.

Q. (By Mr. McTernan): How high was this sweat box that you knew there at the Colquitt prison?

A. The one we had, the average-sized man, a man like me, had to stoop to get in it.

Q. How tall are you?

A. I am five, eight and a half. I couldn't stand upright in it. [86]

Q. Have you seen men at the Conquitt prison—did you see men—beaten with any instruments other than straps?

(Testimony of Horace B. Conkle.)

A. The walking bosses all carried hickory sticks.

Q. What is a walking boss?

A. He is the man that is in charge of production, you might say, he is the one that knows the nature of road repairing and any other repairing you might be doing.

Q. Is he connected with the prison?

A. Yes, he works for the County just like all the rest of them do.

Q. Will you describe the hickory sticks that these men are armed with?

A. They are about four or five feet long, they are about as thick as a man's arm, and they usually cut them right close to the tree where there is a knot at the end of it, about the size of a man's fist, and they season those sticks to use them for what they use them for.

Q. What do they use them for?

A. They use them to whip a prisoner down.

Q. What portion of the body do they hit a man on?

A. They didn't care where they hit him, just hit him is all.

Q. Have you seen them use it in this way?

A. Yes.

Q. Anywhere on the body where they can strike? [87] A. Yes.

Q. Do you know of a number of such instances—can you recall any of those instances that you have seen?

(Testimony of Horace B. Conkle.)

A. It was more or less a common occurrence to see them hit a man once or twice with it. That happened in the course of practically every day. It wasn't too common to see them when they would beat them down to the ground, though. I have seen that maybe on three different occasions.

Q. Did you ever see prisoners beaten with anything besides straps and these hickory clubs that you have described, that you can recall?

A. Not that I recall.

Q. Do you recall a man being beaten with a chain?

A. I saw them take an upright chain and whip a man one time with it.

Q. Who did that?

A. That was the shotgun boss.

Q. What is the shotgun boss?

A. He is the man that carries the gun.

Q. Is he with the road gang when it is out on the road?

A. Yes, he is responsible for keeping you there.

Q. How many shotgun bosses are there per road gang?

A. It all depends on how big a gang.

Q. What is the ratio of shotgun men to prisoners? [88]

A. Three men to every twenty-five.

Q. You say you saw one man beaten with a chain? A. Yes.

Q. Was that out on the road? A. Yes.

(Testimony of Horace B. Conkle.)

Q. What happened to that man during that beating, do you know?

A. They just beat him to the ground. We don't know, I don't know for sure, but they took him away from there and said they took him back to the State Farm. We later heard that the man died.

Q. In any event, all you know is after he was beaten he was taken away? A. Yes.

The Court: The rest of it is hearsay.

Q. (By Mr. McTernan): Were the guards over these chain gangs equipped with guns?

A. Yes.

Q. Did you ever see a guard force a man to do anything at gun point?

A. Oh, yes. I have seen them force them to fight each other at gun point. I have seen them—well, like for instance the time I was drowned, why, the guards forced the trusties to hold me under the water at gun point.

Q. Did you ever see guards force a prisoner to unload [89] a harrow from the back of a truck at gun point?

A. Oh, yes, I saw—we had this truck backed up to the shoulder of the road, we were sodding this road, sodding the shoulders, planting grass on it to keep it from washing, and there was a disc harrow in two sections, it was loaded in the back of a dump truck, and we unloaded one section, and James King —I know James King and this boss didn't get along together very well.

(Testimony of Horace B. Conkle.)

Q. Who was James King?

A. He was a colored convict. So the boss said James wasn't doing his share of the work when we unloaded the first half of the harrow. He says, "Now, you get around there, you big black son-of-a-bitch and grab that harrow and pull it off of that truck." And James looked at him and said, "Boss, that thing will kill me." "You heard what I said." So we had this truck backed up to this bank so it wouldn't fall too far to break the harrow when it hit the ground. He made the rest of us get on the sides of the harrow and pull it. James couldn't pull it by himself, and he was right in the center, this big disc harrow, and when we jerked it off, the harrow landed right on top of him. He went backwards on the shoulder of the road like that (indicating), and I guess he caught his heel or something, and that harrow landed right on top of him, and it crushed him and cut him all to pieces. There was no hearsay to [90] that. He died right then. He was dead when they hauled him off.

Q. You were present this morning, were you, Mr. Conkle, when Mr. Middlebrooks testified concerning the stock? A. Yes.

Q. Did they have a stock at the prison that you were confined in? A. Yes.

Q. Would your testimony concerning the nature of the stock and manner of its use be substantially the same as Mr. Middlebrooks?

A. About the same thing.

(Testimony of Horace B. Conkle.)

Q. Mr. Middlebrooks testified that they kept men in the stocks at Walton approximately an hour. Can you recall the period of time that either you yourself or other people have been confined in stocks at Colquitt?

A. I have seen men put in stocks and kept there four and five hours, kept there hours after they became unconscious in the stocks.

Q. Were they placed in the stocks substantially the same way, with their knees wired down the way Mr. Middlebrooks stated this morning?

A. Yes. We had a head notch in our stocks, instead of using a 2 by 4 the warden recommended a quarter section of a piece of cord wood, it came up like that to a point, [91] and you sat on that point.

Q. Instead of sitting on the 2-inch side of a 2 by 4 you sat on the pointed side of this rough-hewn cord wood, is that right? A. That's right.

Mr. McTernan: You may cross-examine.

Mr. Thomas: The respondent at this time will move the court to strike the testimony of the witness on the following grounds: that the testimony is incompetent, irrelevant and immaterial to any valid issue before the court; secondly, on the ground that the petition in this case and counsel's opening statement does not state facts sufficient to constitute a cause of action; and, thirdly, the testimony bears upon issues which are beyond the scope of the jurisdiction of this court.

(Testimony of Horace B. Conkle.)

The Court: The motion will be taken under submission along with the others.

Mr. Thomas: No cross-examination.

The Court: Did you serve your time or escape?

The Witness: I served my time, your Honor.

The Court: How long?

The Witness: Four years and eight months.

The Court: When were you released?

The Witness: July of 1939.

The Court: When did you come to California? [92]

The Witness: I came to California August of '48.

The Court: Where did you live between '39 and August of '48?

The Witness: I was in the Service almost five years during the war. Then I lived in Georgia from '39 when I came out until I went in the Service. When I came out of the Service I lived in New York with my mother until I came out here.

The Court: What business are you engaged in?

The Witness: I am a decorator.

The Court: You live in Santa Barbara?

The Witness: Yes.

The Court: You are self-employed?

The Witness: No, sir. I work for a company.

The Court: Thank you very much.

Mr. McTernan: Your Honor, I overlooked a couple of things.

(Testimony of Horace B. Conkle.)

Q. (By Mr. McTernan): Mr. Conkle, were you back in Georgia in '45 and '46?

A. Yes.

Q. Did you see chain gangs at work at that time?

A. Yes.

Mr. Thomas: May my objection previously made go to these additional questions?

The Court: The same objection heretofore made may go [93] to this entire testimony.

Q. (By Mr. McTernan): Were these chain gangs that you saw in 1945 and 1946 engaged in substantially the same kind of work that you were engaged in when you worked in the chain gang?

A. Yes, sir.

Q. And were their hours of work approximately the same?

A. In most of the counties. There are two counties in Georgia that I know has got eight hours now.

Q. Do you know whether that applies to the Walton?

A. No, sir. Bibb County and Muscogee is the only two that got the eight-hour law.

The Court: You mean the prisoners cannot be compelled to work more than eight hours in one day?

The Witness: That's right.

Q. (By Mr. McTernan): But as far as you know that did not apply to Walton or Colquitt; is that right?

A. That is right. There is only two of them that has, Bibb and Muscogee.

(Testimony of Horace B. Conkle.)

The Court: Did you see any quarters?

The Witness: Yes.

The Court: The same kind of quarters?

The Witness: Yes, sir.

The Court: Did you observe any brutality on this trip [94] in '45 and '46?

The Witness: No, sir; I couldn't very well.

The Court: Did you see the guards?

The Witness: Yes, sir.

The Court: Still armed with shotguns?

The Witness: Still the same, shotguns, rifles and pistols.

The Court: The men still in ankle shacks?

The Witness: Men still in shacks, still in stripes. Some of them were dressed in browns. I don't know whether they were supposed to be trusties or not.

Q. (By Mr. McTernan): What about hickory sticks, did you see those in 1945 and '46?

A. They were in evidence, yes.

Q. Straps?

A. I didn't see any straps.

Q. Did you see the food that they were given when you were back there in '45 and '46?

A. No.

Mr. McTernan: That is all.

Mr. Thomas: We will renew our motion to strike the witness' testimony to the last few questions, your Honor, on the same grounds as heretofore set forth.

The Court: The motion will be taken under submission.

Does that conclude the material from this witness? [95]

Mr. McTernan: Yes, your Honor.

The Court: You may step down.

Mr. McTernan: Your Honor, Mr. Conkle is here under subpoena. I take it he may be excused?

The Court: You may be excused, Mr. Conkle.

Mr. McTernan: If the court please, I offer as Petitioner's Exhibit next in order a document consisting of three sheets. First a certificate from the State Board of Corrections concerning Harold G. Gibbs and his conviction and sentence in the jails of Georgia, and two pages consisting of an affidavit concerning the living conditions in the prison where he was confined.

Mr. Thomas: To which the respondent sheriff objects on the ground that the exhibits are immaterial, incompetent and irrelevant to any issue validly before the court. Secondly, on the ground that the petition for a writ does not state facts sufficient to constitute a cause of action. And, thirdly, the relief prayed for in the writ is beyond the scope of the jurisdiction of this court.

The Court: It is the same objection that you made heretofore?

Mr. Thomas: Yes.

The Court: Who is Gibbs?

Mr. McTernan: He is identified in the certificate, your Honor, as a former convict and prisoner of the State of Georgia. [96]

Mr. Thomas: Also on the additional ground that

we would like to object because we have no right by this affidavit procedure to cross-examine the witness.

The Court: Of course, there is no foundation laid. If there is an objection either to the foundation or the use of the affidavit, the objection will have to be sustained.

Mr. McTernan: I want to call your attention to Section 246 of Title 28 of the U. S. Code, which does permit the receipt of affidavits in proceedings of this kind. And I thought the certificate of the State of Georgia would establish sufficient foundation, to wit, that Gibbs was a man who was sentenced to serve in the Georgia prison and did so serve.

The Court: That is true. I didn't think about that. There is a provision allowing for use of affidavits, but providing something in addition, that the other side may—what is it, take depositions? What does the section say?

Mr. McTernan: The section says upon application for a writ of habeas corpus evidence may be taken orally or by deposition, or in the discretion of the court by affidavit. If affidavits are admitted any parties shall have the right to propound written interrogatories to the affiants or to file answering affidavits.

The Court: Of course this is a photostat of an affidavit. Do you make objection to it because it is a photostat? [97]

Mr. Thomas: Yes, we will object on that ground also, if the original document is not here.

The Court: It is not even an affidavit, counsel; it is a photostat of something which appears to be an affidavit.

Mr. McTernan: It is the best I can offer.

The Court: The objection will be sustained.

Mr. McTernan: May the document be marked and kept in the rejected exhibit file?

The Court: Mark it for identification, Mr. Clerk.

The Clerk: Petitioner's Exhibit 8 for identification.

(The document was marked Petitioner's Exhibit No. 8, for identification.)

PETITIONER'S EXHIBIT No. 8

State Board of Corrections
Atlanta, Georgia

Certification—

I Hereby Certify that Harold G. Gibbs Reg. No. FM-10608 now serving in Fulton and who was convicted of the offense of (5) Misd. (2) Fict. Cks. at the Nov. term 1948 Superior Court of Fulton County, Georgia, and was sentenced by the Presiding Judge to serve a full term of (5) 6 mo. concur., 6 mo. consec. 6 mos. concur. service of which was begun on the 16th day of Nov. 1948, will have served

said sentence (with) extra "good time allowance" on the 24th day of August 1949 and is entitled to be discharged from service on that date.

/s/ ROBERT N. CARTER,
State Board of Corrections,
Chief Clerk.

Discharge Order

To the Warden of Fulton County PWC:

The above named prisoner being entitled to discharge on the date specified above, you are hereby directed to discharge and set at liberty the said named prisoner on that date.

You will report on regular description form the discharge of the prisoner on the day of release.

This the 20th day of July 1949.

/s/ R. E. WARREN,
Director State Board of
Corrections.

Harold George Gibbs, Jr., being duly sworn deposes and says:

That he makes this affidavit in order to testify to the conditions which existed in Fulton County Public Works Camp, Alpharetta, Georgia, between November 16, 1948, until August 24, 1949.

The conditions which existed in this particular camp at the aforesaid times are of such a horrible

nature that deponent believes that the aforesaid conditions should be exposed before the eyes of the people of the United States.

That the deponent, having entered said camp as an inmate thereof on November 16, 1948, states that:

The first thing is the food. In the morning they feed you grits and gravy. The gravy was burned; the biscuits were just dough; the coffee was nothing but water, with no milk or sugar in it, and when you are out on the road working, they feed you red beans with worms in them, not fit for anybody to eat; the bread was put into a box. This was brought on the road to the road gang, maybe 9:30 in the morning, set on the ground and by the time we got it at dinner time the box was full of ants. When we came in at supper time, after working all day out on the road, we were fed the same thing we had for breakfast, things that were left over from breakfast.

We slept on straw mattresses, with no sheets or pillow cases. The whole time I was there these mattresses were never changed. They had punishment which they called a box. I saw fellows put in there for drinking too much water on the road while working. They were left in there 8 or 10 days, fed one biscuit in the morning with water, one biscuit at supper with water. Every five days they were given a meal, so-called, consisting of maybe a plate of beans and a piece of cornbread. There were no beds in these boxes, no toilet but were given a bucket to use, no place to wash. When you were

put in there they made you take all your clothes off, winter or summer, and slept there with one blanket, on the floor. I have seen the warden make fellows get out and fight in the yard over an argument which they might have had between themselves, and when they were tired and exhausted he would make them keep on fighting by slapping them over the face or hitting them over the head with a slapjack. Our walking boss or shot-gun man, when you were tired and would quit working, would come over and hit us over the head with a club, which was called a "walking stick."

They rode you to work in an open dump truck in the winter-time, maybe 10 or 15 miles, according to where we were going to work on the road. I have seen fellows shot in the back when they tried to escape; I have seen them beaten, when caught, and when they were brought back to camp, they were put into stripes and thrown into the box for three weeks on just bread and water. When they were left out of the box they were made to wear those stripes for 90 days.

I know of one particular case of a man by the name of Forrest Turner who was beaten for refusing to work and as a result of this beating received a permanent injury to his hip and to this day still walks with a limp although he was beaten about 9 months ago.

Conditions in these camps are such that it isn't even fit for a dog to live in, let alone a human being.

As I am a white fellow and have seen with my

own eyes the Negro race treated worse that what I have said and what I have been through.

I live at 2817 C Street, Chester, Pennsylvania, which is my permanent address.

/s/ HAROLD G. GIBBS, JR.

Sworn to this 19 day of Oct., 1949.

[Seal] /s/ EUGENE ELINEK,
Notary Public, State of New York.

Admitted Dec. 20, 1948.

Mr. McTernan: Your Honor, we at this time ask the court to take judicial notice of the report of the President's Committee on Civil Rights entitled To Secure These Rights, and in particular a portion thereof which is not very long, which I would like to read, so that this document which I have obtained from the public library will not be marked and become a part of this record.

Mr. Thomas: To which the respondent objects on the ground that the proffered testimony is incompetent, irrelevant and immaterial.

The Court: Is this an unofficial committee or was it an official committee of the government? [98]

Mr. McTernan: It is my understanding that this is an official committee appointed by the President of the United States, which reported to him. This

is its report. The report was not only filed with the President, but also with Congress, and certain recommendations for legislation were prepared on the basis of this report.

The Court: How long is the extract?

Mr. McTernan: The part I have marked here is longer than I thought. If you give me a minute I think it can be boiled down into two short paragraphs.

The Court: Let me say this: On the representation that this is an official committee appointed by the President, that the report was made to the President and submitted to a Congressional Committee, I will overrule the objection and permit it in evidence. However, it seems to me if you have any more documentary evidence of that sort we can save a lot of time.

Mr. McTernan: This is all I have.

The Court: The meat of this coconut is whether the court has jurisdiction and whether you have a cause of action. That is the interesting part of this case. I want you to get into that.

Mr. McTernan: I want to get into that.

The Court: We will take a five-minute recess at this time and maybe by that time you will have it boiled down. [99]

(A recess was taken.)

Mr. McTernan: Shall I read now these portions?

The Court: Yes.

Mr. McTernan: The copy I happen to be read-

ing from is a reprint of the report as appeared in the San Francisco News.

The Court: Was the report printed in the Federal Register, do you know?

Mr. McTernan: I don't know, frankly, your Honor. There were up until a few days ago in my office some of the official volumes that were pulled out of it, and when I came to get it for the purposes of this case I couldn't get it, and I had to go to the library to get this.

The Court: All right.

Mr. McTernan: The portion that we call to your Honor's attention reads as follows:

"Toward the end of the work of this committee a particularly shocking instance of this occurred. On July 11, 1947, eight Negro prisoners in the State Highway Prison Camp in Glynn County, Georgia, were killed by their white guards as they allegedly attempted to escape. The Glynn County grand jury exonerated the warden of the camp and four guards of all charges. At later hearings on the highway prison camp system held [100] by the State Board of Corrections conflicting evidence was presented. But one witness testified that there was no evidence that the prisoners were trying to escape. In any case, he said it was not necessary to use guns on them in the circumstances. 'There was no justification for the killing. I saw the Negroes where they fell. Two were killed where they crawled under the bunkhouse and two others as they ran under their

cells. The only thing they were trying to escape was death. Only one tried to get over the fence.' The warden and four guards were indicted by a Federal Grand Jury on October 1, 1947, and acquitted by a jury November 4th.

"It is difficult to accept at face value police claims of this type that action has been taken against prisoners in 'self-defense' or to 'prevent escape.' Even if these protestations are accepted, the incidence of shooting in the ordinary course of law enforcement in some sections of the country is a serious reflection on these police forces. Other officers in other places seem able to enforce the law and to guard prisoners without resort to violent means. The [101] total picture—adding the connivance of some police officials in lynchings to their record of brutality against Negroes in other situations—is, in the opinion of this committee, a serious reflection on American justice. We know that Americans everywhere deplore this violence. We recognize further that there are many law-enforcement officers in the South and North who do not commit violent acts against Negroes or other friendless culprits. We are convinced, however, that the incidence of police brutality against Negroes is disturbingly high. In addition to the treatment experienced by the weak and friendless person at the hands of police officers he sometime finds that the judicial process itself does not give him full and equal justice. This may appear in unfair and perfunctory trials, or in fines and prison sentences

that are heavier than those imposed on other members of the community guilty of the same offenses. In part, the inability of Negro, Mexican or Indian to obtain equal justice may be attributed to extra-judicial factors. The low income of a member of any one of these minorities may prevent him from securing [102] competent counsel to defend his rights. It may prevent him from posting bail or bond to secure his release from jail during trial. It may be predetermining his choice, upon conviction, of paying a fine or going to jail. But these facts should not obscure or condone the extent to which the judicial system itself is responsible for the less than equal justice meted out to members of certain minority groups."

Mr. Thomas: At this time respondent moves to strike the excerpts read on the ground that the testimony is incompetent, irrelevant and immaterial.

The Court: And upon all the other grounds you have previously stated?

Mr. Thomas: That's right.

The Court: I will reserve ruling on that motion, too.

Mr. McTernan: We rest, your Honor.

Mr. Thomas: We rest, your Honor.

The Court: For the purpose of assisting you in your argument, as far as the factual issues are concerned, I will define briefly the facts which are not very much in dispute.

We find that this petitioner was born on the date stated by him.

Mr. McTernan: February 11, 1917.

The Court: Yes. And that at about the age of fourteen [103] he was arrested for five acts of burglary and was handled by the juvenile authorities and sent to a school. That subsequently he was indicted by the grand jury of this county in Georgia. Apparently it was an indictment based on the same acts as the juvenile offense. I don't know anything about the law of Georgia. It may have been proper to have prosecuted by indictment an individual after it became impossible to handle him in a juvenile manner. Juvenile proceedings in this State are not prosecutions. California law is clear on that. And the court will assume, in the absence of law to the contrary, that Georgia law is similar. I find, also, which are really facts on which this case will hinge, that at the time of his purported arraignment he did not have counsel. There is a conflict between the documents and the testimony of the witness that he was even arraigned. The document says he was arraigned. He denies it. I find that there was an arraignment as set forth in the document, but that he did not have counsel to represent him, and that he was of whatever age it figures out at that time, I take it that is seventeen. That he was sentenced to a year each on five counts to run consecutively; that he escaped from the camp, was returned, served some more time and escaped again. I am going to find, also, that the type of punishment and housing, treatment of prisoners in the State of Georgia, con-

stituted cruel and [104] unusual punishment as the term is referred to in the Constitution.

On the basis of those findings, it seems to me that there are two questions presented, among others. Assuming that there was cruel and unusual punishment, is that any basis for the granting of a writ of habeas corpus here in the Federal Court? That is a legal problem. Beyond the factual stage now, we get down to what the cases say.

Secondly, assuming he did not have counsel at his arraignment and sentence, is there a legal basis for granting a writ of habeas corpus here in the Federal Court?

I have read a little law on that, and it is a very interesting problem. There are several other questions that I want to suggest to you in your argument. Johnson v. Dye was reversed by the Supreme Court by merely a citation of the Hawk case. The Hawk case was a case growing out of a state prosecution where a man had been prosecuted in one of the States of the Union for a crime of murder. Various appeals in an attempt to review the matter were taken. Finally when the matter got to the Supreme Court the Supreme Court held in the Hawk case that he had not exhausted his State remedies. We therefore take it to be the rule that before you come into the Federal Court you must exhaust your State remedies. That is, I think, the law, and I think both sides concede that. So one of the questions [105] presented here is when you say you must exhaust State remedies, does that

mean you must exhaust State remedies of, in this case, both California and Georgia? Obviously, if the rule is broad enough to require that you have to exhaust State remedies in Georgia, then you haven't complied with the rule, because there has been no showing of any kind that any attempt was made to exhaust Georgia remedies. There is a question presented there.

By the way, I haven't read the return of the sheriff carefully, but I suppose there is no dispute that counsel for the petitioner and the petitioner have taken the various steps in the State Court and in the Supreme Court of the United States, as he alleges in his petition, is there?

Mr. Thomas: Your Honor, we are willing to stipulate, I found out yesterday by checking, that the sheriff was officially notified that they did seek a writ or stay, rather, from the Supreme Court of California, and that a writ was denied there, a stay was denied, by the Supreme Court of California to allow certiorari to be filed. Other than that I don't know.

The Court: I take it that the court would be required to almost take judicial notice of the proceedings in the Supreme Court, would it not?

Mr. Thomas: I will take counsel's statement.

Mr. McTernan: I can supply you with the documents if [106] you care to look at them.

The Court: Counsel so states, don't you, that you took the proceedings as you have alleged in your petition?

Mr. McTernan: Yes; and I covered in my opening statement, too, that we asked for a stay from the Supreme Court of California—first we asked for habeas corpus from the Superior Court, the District Court of Appeals, and the Supreme Court of California, we asked for a stay pending application for certiorari from the Supreme Court of California——

The Court: Which was denied?

Mr. McTernan: Yes, which was denied. We asked for a stay from two justices of the United States Supreme Court.

The Court: Which was denied?

Mr. McTernan: Yes.

The Court: By Douglas without prejudice, and by Black without any notation whatsoever?

Mr. McTernan: Yes.

Mr. Thomas: You did not file a petition for certiorari in the Supreme Court of the United States?

Mr. McTernan: No, I did not.

The Court: So we have the question of when the Hawk case talks about exhausting the State remedies, do they mean both Georgia and California? Assuming for the purpose of argument, certainly in so far, we will say, as petitioner's [107] first point is concerned, that California was without jurisdiction to act and that they are complaining of California's action, and assuming, therefore, from that standpoint they wouldn't have to exhaust Georgia's remedies, the next question is have they

exhausted all the remedies within the State? Does the fact that they didn't petition for certiorari but petitioned for a stay so they might seek certiorari, or any other thing appearing in there, indicate that they didn't exhaust remedies in California?

Another question that comes to my mind, is the California decision res judicata?

I may be wrong on this, but there is no showing here on what grounds relief was sought in the State Courts. Or do you allege that in your petition?

Mr. McTernan: I am not very clear in my mind on that just now, your Honor.

Mr. Thomas: They allege they filed a petition, but they don't say on what ground.

The Court: Can we stipulate, so we will have a clear record in this case, that the relief sought in the State Courts of California was upon the same grounds as sought here, can we so stipulate?

Mr. Ternan: I will so stipulate, because it is a fact. If counsel feels he cannot stipulate, I would like to put a witness on. [108]

The Court: That is the most favorable position for the sheriff here.

Mr. Thomas: Just one moment, your Honor, if I may, to straighten out one point.

Your Honor, I cannot stipulate to that for the reason that I was not present at any of the hearings in either the District Court of Appeals or in the Supreme Court. I don't know what they filed.

The Court: Can you take counsel's word for it? As I see it, that is probably the strongest posi-

tion that respondent would have here, particularly in view of the fact that it may possibly be a question of res judicata, assuming that the same issues were raised in the State Courts and went clear through the State Courts and the Supreme Court of the United States finally denied a stay. If there were different issues raised in the State Court, then that point would not be available to you.

Mr. Thomas: I think there are one or two issues raised here that were not raised in the lower court.

The Court: Then maybe that point is not involved.

The only way that point would arise is in the event the same questions were raised. I am not saying there is even a point there, but I am thinking out loud. If the same points were raised in the State Courts, it conceivably could be argued that it might be res judicata and therefore there [109] could be nothing that this court could decide. But in the absence of any stipulation as to what went on in the State Courts, I think our record is deficient, counsel, in any showing as to what you did in the State Courts.

Mr. McTernan: I would be glad to supply that deficiency, your Honor.

The Court: I would like to have it supplied. If I am going to decide this case, I would like to have a complete record. The record shows now that you sought a writ of habeas corpus in the Superior Court, District Court of Appeals, and the Supreme Court. There is no showing of what ground, and

therefore on the question of exhaustion of remedies, itself, it seems to me the record should show some manner of the relief you sought. Do you have copies of the petition you sought?

Mr. McTernan: I think I have copies of everything. I was going to have Mr. Simmons testify to it.

The Court: Was the petition identical in the three courts?

Mr. McTernan: Mr. Simmons advises me that the petition was identical with the exception of the necessary introductory language, and with the exception that as we went to each successive higher step we had to add what went on before.

Mr. Simmons: In the trial court in the Superior Court [110] in Santa Barbara we used less language than we did in the District Court and in the Supreme Court of California. We went into great detail and pleaded all the facts which were testified to here today, we did it much simpler in the Superior Court, but the same points were there, your Honor.

The Court: Let's make this order: I do not think I am going to be able to decide this from the bench here unless you gentlemen are very persuasive, because I am very frankly on the fence about it. Let's provide an order that the attorney for the petitioner may subsequently file as an exhibit in this case a copy of his petition for a writ in each of the State Courts. In fact, I would suggest that you prepare a document as an exhibit

in this case constituting all of your proceedings in the State Courts. Don't you think that would make a better record?

Mr. McTernan: I think so, your Honor. Suppose I prepare copies of the petitions to each court for habeas corpus with whatever supporting evidence there may have been, together with the application for stay to the Supreme Court of California with the supporting affidavit, and the application for stay to the justices of the Supreme Court of the United States with the supporting affidavit.

The Court: That will be satisfactory, and I think in the case of the Superior Court—that is the only court in which a return was made, was it not? [111]

Mr. McTernan: I believe that is correct.

The Court: Was the return substantially the return that was made here?

Mr. Thomas: Substantially. I think our last return is much more in detail.

The Court: Can't we use this return as the return——

Mr. Thomas: We will provide a copy of the return, if the court desires, to be submitted as the return actually filed in that case.

The Court: In the Superior Court, fine.

Mr. Thomas: I shall offer that now, if I may, your Honor, and that will clear up that point. We will submit at this time a copy, a certified copy of the return filed by John D. Ross, with the attached exhibit, being a photostatic copy of the Governor's warrant, the return being filed in case No. 43360, In

re Application of Sylvester Middlebrooks, Jr., for a writ of habeas corpus in the Superior Court of the State of California in and for the County of Santa Barbara. I will offer that.

The Court: It will be admitted into evidence. Counsel for the petitioner may file a copy of the various proceedings that he took in the courts of the State of California and before the justices of the Supreme Court, to complete the record.

Mr. McTernan: Thank you, your Honor. Do you want our [112] documents certified, because it will take a little time to get the certified documents from Washington.

The Court: Do you think we can waive the certification?

Mr. McTernan: I think I will be able to supply carbon copies of the documents actually filed.

The Court: Is that satisfactory?

Mr. Thomas: That is satisfactory.

The Clerk: I have marked this Respondent's Exhibit as Respondent's Exhibit A in evidence; and the documents which Mr. McTernan is going to file, shall we mark those?

The Court: Assign one number to the entire group.

The Clerk: Petitioner's Exhibit 9 will be the number assigned to the documents submitted by the petitioner.

(The documents referred to were marked Respondent's Exhibit A, and were received in evidence.)

("Petitioner's Exhibit No. 9" was the number reserved for the documents to be submitted by the petitioner.)

Mr. Thomas: Your Honor, may I make an inquiry at this time?

The Court: Yes.

Mr. Thomas: Does the court desire oral argument on this matter now?

The Court: Yes. [113]

Mr. Thomas: Or do you wish us to submit it on brief?

The Court: I would like some argument and probably will want some briefs on it.

In going over some of these points that come to my mind—I mentioned several of them already—another point that comes to mind is the fact that certainly the function of this court is not to review what the courts of the State of California did. In other words, one of the grounds set forth in the petition for the writ is that Middlebrooks' presence in the State of California is not due to his voluntary act, but due to compulsion in that the Army transported him to Camp Cooke.

That might be a good ground in the State Court.

Mr. McTernan: We are not pressing that.

The Court: I do not think this court has any function in reveiwing that, so I am not going to give any consideration to that particular point.

Which one of you wants to start off and argue

this matter a little bit? Mr. McTernan, supposing you begin.

Mr. McTernan: If the court please, I would like to say a few things concerning the findings which the court indicated orally. I am sure it was not intended to be a comprehensive statement of the findings which the court is prepared to make on this record, but I do feel that there are some additional facts which should be mentioned and that should be [114] before us for the purposes of this argument.

The Court: No, those were not complete findings. Two of them, I think, were significant to assist you in arguing the case. One, I found he was not represented by counsel, and another one is that it is my conclusion that the punishment is cruel and unusual.

I think those are the two essential facts.

Mr. McTernan: In view of certain of the authorities, your Honor, concerning the significance of deprivation of counsel in the State Court, I think that additional facts are of extreme importance. As the court has pointed out in a number of cases where the claim is deprivation of the right of counsel in a State Court, the plain fact of deprivation or lack of counsel in a non-capital case is not determinative of the issue as to whether or not there has been an infringement of a constitutional right, but depends upon all of the circumstances present at the time. I would like to point out in this connection that the undisputed record here is that Middlebrooks was arrested in June or July of 1934, and

held in jail without charge and was never given or shown or told about the charges against him until he was taken before the judge for purposes of what the jailer called a trial. That at this time Middlebrooks was seventeen years old; that he had not completed the third grade in the Georgia public schools; that he had little or no familiarity with legal [115] procedure, other than to know he did have a right to counsel and did have a right to a jury trial, both of which he asked for, and both of which were denied him. There is a conflict in the testimony as to whether or not he pled guilty. The Georgia record shows that he pled guilty. He testified that he did not plead guilty. In fact, that he said that he wanted a jury trial. There is a conflict in the evidence concerning the arraignment. Your Honor is inclined to hold that there was an arraignment, but I want to point out to your Honor that the testimony here is that he was at that time simply addressed by the court saying, "What do you mean going around breaking the laws of Georgia?" or something to that effect, and he denied he had broken the laws of Georgia.

The Court: The court's findings will not be findings until they are signed in writing. There is a dispute on that part. The other matters you state about which there is no dispute I would have no trouble in finding; that he was seventeen and he only went to the third grade, nobody saw him except his mother, and he was never handed a copy of the indictment. There is only the one matter on which there is dispute.

Mr. McTernan: Yes. I went into these matters that are in dispute because they form the basis for an additional contention on our part, and that is there was no [116] trial for a reason other than the fact that there was a deprivation of counsel. He was not told what the charges were, given an opportunity to plead, and given what he asked for namely, a trial on the issues of fact before a jury. So that the lack of due process stems both from the deprivation of counsel and from the proceedings that took place before that judge back on February 8, 1935.

Your Honor has posed certain problems, and I will try to develop my argument around them.

(Whereupon the case was argued to the court by counsel for the respective parties, which argument was reported by the court reporter but not requested by counsel to be transcribed.)

The Court: It is almost 4:30, and I want you gentlemen to brief this and as expeditiously as possible. I suppose there is a need for a speedy decision, solely because the County of Santa Barbara is supporting this petitioner, for which, however, they will be reimbursed by the State of Georgia. How much time would you need. Mr. McTernan, to get an opening brief in here?

Mr. McTernan: I think we can do it in a week, your Honor. If we can do it in less, we will. I do have other commitments which have to be met.

The Court: That puts you right over the Christmas holidays. It seems to me that the line of dis-

cussion has [117] been pretty well marked out here. It is a question of organizing the material and your arguments. This is the 20th, isn't it? How much time would you want to answer?

Mr. Thomas: They are only going to have a week, your Honor?

The Court: Yes.

Mr. Thomas: Ten days, your Honor, for a reply. We haven't any objection if they take ten days to file their opening brief.

Mr. McTernan: We were trying to cut the time down because so far Mr. Middlebrooks has remained in custody. We would like, your Honor, to raise, sometime along here, the question of releasing him on bail while this matter is under consideration. We are right up against the holidays now. In view of the fact that some time will be taken for submitting briefs——

The Court: My mind is not made up on this thing. It is wide open. It is an interesting problem. I would like to see a good brief on it. If I were convinced for certain that I was going along with petitioner's view, I would consider bail. But my mind is not made up, so under those circumstances, and having in mind the general rule of habeas corpus, that you don't disturb custody, I am not inclined to grant bail. Apparently Mr. Middlebrooks likes California, although he would rather be outside than in, and I think [118] he will be well treated in Santa Barbara. A little delay is not good, but he

has a lot at stake, and he can well be patient with his counsel to write a good brief.

Mr. McTernan: I would like to write a good brief, but I would like it better if I had a little more time if it was not at the expense of Mr. Middlebrooks.

The Court: I don't think Mr. Middlebrooks is going to be concerned about that.

You are being well treated, are you not, presently?

Petitioner Middlebrooks: Yes, sir, it is all right now.

Mr. McTernan: Well treated for a jail.

The Court: It is a good little county. I was born up there.

Mr. McTernan: But these holidays are coming.

The Court: How much time do you want? I am not going to grant bail. If you want ten days, I will give you ten days.

Mr. McTernan: May we leave it this way, that we have a maximum of ten days and we will get it in sooner if we can, and your time runs from the receipt of our brief?

Mr. Thomas: That is satisfactory.

The Court: All right. Petitioner's memorandum of points and authorities to be filed on or before December 30th, respondent's points and authorities to be filed ten [119] days thereafter.

The Clerk: Ten by ten would cover it.

The Court: Ten by ten, then.

Would you like to have time to reply?

Mr. McTernan: I would like to have time if I feel so advised.

The Court: I will give you five days to reply. Ten, ten, and five.

Mr. McTernan: Your Honor, Mr. Loren Miller was here this morning and could not come back after lunch because of a court engagement. He had come to file an appearance amicus curiae on behalf of the National Association for Advancement of Colored People. When he was unable to return he asked me if I would ask the court for permission to enter that appearance, and he may desire—I haven't discussed it with him—to file a brief amicus curiae.

The Court: Permission will be granted for his appearance as amicus curiae, and if he is so inclined, to file a brief. However, I would rather have one good brief in this case and not have to read half a dozen. You and Mr. Miller are good friends, and I suggest that he could well give you some help in preparing the matter. But it is all right, if he files it I will read it.

Mr. McTernan: Thank you.

The Court: In your memorandum I would like you to [120] direct your attention to the matters that I suggested heretofore and any other points that you think pertinent for a decision of this case. The matter then to stand submitted, is that satisfactory?

Mr. McTernan: To stand submitted upon the filing of the briefs?

The Court: Yes.

Mr. Thomas: Your Honor, in the event of a decision by your Honor with respect to going either

way in this case, Mr. Richards has asked me to inquire whether or not you would contemplate granting either side a stay of execution, whichever way it went, in order to perfect an appeal.

The Court: I would have to check a little further on the rules. The rules of the Circuit set out the provisions for bail in habeas corpus cases, and they, in substance, provide that custody is not disturbed. This is a matter of law. You can look up the law and the rules on it. I am just telling you from memory what I remember about it. So, for instance, if this court discharged this writ, remanded this man to custody, and the appellant took an appeal, under the rules of the Circuit custody would not be disturbed. They might take their appeal, and probably would be entitled to some surety or some arrangement for the return of the man to respond to any order of the court on appeal. I think it is Rule 29. On the other hand, if the [121] court granted the writ and discharged him from custody, and the respondent appealed, again the rule is you don't disturb the situation that has been created, but he could be required to put up bail to respond to the order in the event it was reversed.

This is very rough in my mind, but generally speaking I think that is the situation.

Mr. Thomas: We asked the question, your Honor, by reason of the existence of Section 2251 of Title 28, which reads——

The Court: How does it read?

Mr. Thomas: "A justice or judge of the United

States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

"After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending."

I don't know whether that rule affects or changes some of the old rules. [122]

The Court: I will certainly give either side a chance to turn around.

Mr. Thomas: That is all we want.

The Court: That is what an attorney should want, just give him a chance to get his feet under him and decide what he wants to do next.

I don't know what the legal situation is myself.

Mr. Thomas: Thank you.

The Court: All right. [123]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and

correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 1st day of June, A.D. 1950.

/s/ SAMUEL GOLDSTEIN,
Official Reporter.

[Endorsed]: Filed June 9, 1950, U. S. C. A.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 113, inclusive, contain the original Petition for Writ; Order for Issuance of Writ of Habeas Corpus; Writ of Habeas Corpus; Return by John D. Ross, Sheriff of Santa Barbara County, California; Opinion; Order for Release of Petitioner; Disapprovals as to Form and Objections to Proposed Findings of Fact; Conclusions of Law and Judgment; Findings of Fact and Conclusions of Law; Judgment; Application for Allowance of an Appeal by Respondent, John D. Ross, Sheriff of Santa Barbara County, California, and for the Issuance of a Certificate of Probable Cause; Order

Allowing Appeal and Certificate of Probable Cause; Appointment of Attorneys; Notice of Appeal and Designation of Contents of Record on Appeal and full, true and correct copies of minute orders entered December 20, 1949, February 3, 1950, April 5, 1950 and April 27, 1950, which, together with Original Petitioner's Exhibits 1 to 9, inclusive, and Original Respondent's Exhibit A, and Original Reporter's Transcript of proceedings on December 29, 1949, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $4.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 8th day of June, A.D. 1950.

EDMUND L. SMITH,
Clerk.

[Seal] /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12572. United States Court of Appeals for the Ninth Circuit. John D. Ross, Sheriff of Santa Barbara County, California, Appellant, vs. Sylvester Middlebrooks, Jr., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed June 9, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12572

JOHN D. ROSS, Sheriff Santa Barbara County, California,

Appellant,

vs.

SYLVESTER MIDDLEBROOKS, JR.

Appellee.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To Paul P. O'Brien, Clerk of the United States Court of Appeals for the Ninth Circuit.

Will you please take notice that John D. Ross, appellant in the above-entitled action, has appealed to the United States Court of Appeals for the Ninth Circuit from that certain decision of the United States District Court, Southern District of California, Central Division, including all findings of fact, all conclusions of law, and judgment and order filed in the office of the Clerk of said Court on or about May 2, 1950, discharging the appellee, Sylvester Middlebrooks, Jr., from the custody of the appellant John D. Ross, Sheriff of Santa Barbara County, California, and from each and every part of said decision, findings of fact, conclusions of law, judgment and order, as well as from the whole thereof, and the appellant John D. Ross

hereby requests and designates that there shall be made up and printed on this appeal the entire record of all proceedings and all matters relating to the above-entitled cause, excluding, however, (1) the proposed findings of fact and conclusions of law submitted by petitioner (appellee herein), (2) the proposed judgment of petitioner (appellee herein) and (3) disapproval and objections of respondent (appellant herein) to petitioner's proposed findings of fact and conclusions of law and judgment.

Dated this 16th day of June, 1950.

/s/ DAVID S. LICKER,

District Attorney of the County of Santa Barbara.

/s/ VERN B. THOMAS,

Assistant District Attorney of the County of Santa Barbara.

Attorneys for Appellant John D. Ross, Sheriff of Santa Barbara County, California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 17, 1950.

[Title of Court of Appeals & Cause.]

APPELLANT'S STATEMENT OF POINTS ON APPEAL

Comes now the above-named appellant and presents a statement of the points upon which he intends to rely on the appeal of the above-entitled cause.

Introduction

The Governor of Georgia invoked into operation the provisions of Art. IV, Section 2, Clause 2, of the Constitution of the United States, and the Act of Congress Regulating Interstate Extraditions, by making a demand on the Governor of California for the arrest of Sylvester Middlebrooks, Jr., as a fugitive from Justice from the State of Georgia. Such demand was made in the form and manner required by such designated provisions. The Governor of California thereupon issued a fugitive warrant for the arrest of Sylvester Middlebrooks, Jr. The Sheriff of Santa Barbara County thereupon took and held in custody the appellee-petitioner, Sylvester Middlebrooks, Jr., under and by virtue of such fugitive warrant issued by the Governor of California.

Subsequently, appellee-petitioner filed successive petitions for a writ of habeas corpus in the Superior Court of the State of California in and for the County of Santa Barbara, and in the District Court of Appeals of the State of California, and in the Supreme Court of California, all of which were

denied. Appellee-petitioner then filed a petition for a writ of habeas corpus in the District Court of the United States of America, Southern District of California, Central Division. The case came on for hearing before the Honorable James Carter, District Judge, on the 20th day of December, 1949. The court took the matter under submission and thereafter, on February 3, 1950, rendered its decision and directed appellee to submit judgement and findings. On May 2, 1950, the District Court approved findings and rendered a judgment in favor of the appellee-petitioner and against the appellant-respondent, John D. Ross, Sheriff, Santa Barbara County, California, and ordered the discharge of the appellee-petitioner from the custody of the appellant. Error was committed by the District Court of the United States of America, Southern District of California, Central Division, in discharging the appellee-petitioner from custody in the respects hereinafter set forth:

I.

The District Court erred in hearing and determining in the asylum state and constitutional validity of phases of the penal action by the demanding state in respect to the fugitive and his offenses.

1. The scope of inquiry in a petition for a writ of habeas corpus, in cases having an extradition base, is limited, under provisions of Art. IV, Section 2, Clause 2, of the Constitution of the United States, and the Act of Congress Regulating Interstate Ex-

traditions (Section 3182 of Title 18, U. S. C.), to the following questions: (a) whether the person demanded has been substantially charged with crime and (b) whether he is a fugitive from justice of the demanding state.

The petition for a writ in the instant case, filed by appellee-petitioner, requests relief, on the other hand, not within the permissible scope of inquiry, but on the alleged principle grounds:

(1) That appellee-petitioner was denied assistance of counsel in the courts of the demanding state, Georgia (paragraph II, subd. (1) (a), pgs. 1 and 2 of the petition).

(2) That there were alleged violations of constitutional rights in connection with his commitment and conviction for burglary offenses in the demanding state (paragraph II subds. (1) (a), pgs. 1, 2 and 3 of the petition).

(3) That he had sustained cruel and unusual punishment while incarcerated on such judgment of conviction and that he would be subjected to cruel and unusual punishment if returned to the demanding state (paragraph II subds. Nos. 3, 4, and 5; and paragraph I subd. (2) at pg. 5 of the petition).

(4) And, that, hence, the fugitive warrant issued by the Governor of California upon demand of the Governor of Georgia was null and void and violated the Due Process Clause of the Fourteenth Amendment of the United States (paragraph II subd. (3) pg. 5 of the petition).

The judgment of the court releasing the appellee-petitioner from custody on the grounds outlined above and as set forth in the petition was contrary to law by reason of the court's non-acceptance and violation of the principle of limiting the scope of inquiry for extradition purposes. The appellant, Sheriff Santa Barbara County, State of California, held the appellee-petitioner in custody in conformity with the requirements of Art. IV, Section 2, Clause 2 of the Constitution of the United States and the Act of Congress Regulating Interstate Extraditions (Section 3182 of Title 18, U. S. C.).

2. The District Court, Southern District of California, Central Division, erred in overruling the motion of appellant that the petition for a writ of habeas corpus did not state facts sufficient to constitute a cause of action against the appellant-respondent, Sheriff of Santa Barbara County, California, by reason of the failure of said District Court to recognize the principle limiting the scope of inquiry for extradition purposes. (See paragraph 4, page 2 of the return by the appellant and an oral motion raising this issue, lines 14 to 20 inclusive, pg. 17 of the Reporter's Transcript.)

3. The District Court, in the habeas corpus hearing, likewise, erred in overruling appellant's objections to the introduction of all testimony and evidence offered and received on behalf of appellee-petitioner (pgs. 19 to 103 inclusive, of the Reporter's Transcript). Appellant's objection to the testimony of Sylvester Middlebrooks, Jr., is reported at page

19 of the Reporter's Transcript, lines 19 to 24, appellant's objection to the testimony of Horace B. Conkle is reported at page 71 of the Reporter's Transcript. Similarly, motions to strike were made on behalf of the appellant, pages 69 and 92 of the Reporter's Transcript. Such objections to the admission of testimony and evidence were taken under submission by the court as also were motions to strike such testimony and other evidence. In paragraph 15 of the court's conclusions of law, page 9, the court overruled all such objections and motions to strike made by appellant. The court thereby erred by its failure to recognize the principle limiting the scope of inquiry applicable to extradition cases.

4. The non-acceptance and violation of the scope of inquiry rule is also the basis of appellant's position that the court erred in the following designated findings of fact, paragraphs numbered 2, 3, 4, 5, 6, 8 and 12, appearing on pages 1 to 6 of the court's findings of fact; and the court also erred in the following designated conclusions of law, paragraphs numbered 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15, appearing on pages 6 to 9 inclusive. For explanatory purposes and brevity, each and all of such designated findings of fact and conclusions of law fall within inquiries not permissible for testing an asylum state's arrest and detention for extradition purposes under the provisions of Art. IV, Section 2, Clause 2 of the Constitution of the United States and the Act of Congress Regulating Interstate Extraditions (Section 3182, U. S. C.).

II.

The District Court erred in determining that the appellee-petitioner for a writ of habeas corpus based upon alleged deprivation of constitutional rights in the demanding state, need not exhaust the remedies of the demanding state.

The appellee's petition for a writ of habeas corpus fails to allege the exhaustion of any remedies of the State of Georgia, the demanding state, nor was there attempted to be shown during the trial the exhaustion of such remedies or that there was an absence of corrective process in that state. The trial court, on the other hand, made a determination that the appellee need not have exhausted his remedies in the State of Georgia. (See part VII of the opinion of the court filed February 3, 1950, and incorporated as a conclusion of law of the court by Section 14 of the court's conclusions of law as if set forth haec verba.)

The District Court erred in holding that the appellee need not have exhausted the remedies of the State of Georgia.

The District Court further erred in this connection in finding that there were extraordinary circumstances existing sufficient to justify federal inquiry into the merits without the exhaustion of remedies of the State of Georgia. Hence, also on this specific ground the court erred in overruling appellant's motion to dismiss the writ on the ground that the petition for a writ did not state facts sufficient to constitute a cause of action, overruling ap-

pellant's objections to the introduction testimony in evidence on behalf of appellee, and overruling appellant's motion to strike such testimony and evidence.

III.

The District Court erred in determining that it was not necessary for appellee-petitioner to apply for writ of certiorari to the Supreme Court of the United States after denial of the writ of habeas corpus by the Supreme Court of California.

Appellee-petitioner was refused relief on a petition for a writ of habeas corpus by a judgment of the Supreme Court of California. Appellee failed to file a petition for certiorari to the Supreme Court of the United States from the judgment of the Supreme Court of the State of California refusing relief.

The trial court in the instant case in its findings of fact, paragraph 9, and paragraph 1 of the conclusions of law, finds that appellee had exhausted all remedies available to him in the courts of the State of California, notwithstanding the failure to file a petition for a writ of certiorari to the United States Supreme Court.

The District Court likewise erred in finding the existence of any exceptional circumstances in the case which would have rendered it unnecessary for the appellee to file a petition for certiorari to the United States Supreme Court from the denial of relief on habeas corpus by the Supreme Court of the State of California.

IV.

The District Court erred in nullifying the provisions of Article IV, Section 2, Clause 2 of the Constitution of the United States and the Act of Congress Regulating Interstate Extraditions by determining in the asylum state that a fugitive has been deprived of constitutional rights under the Fourteenth Amendment in the demanding state.

The fugitive warrant issued by the Governor of the State of California for the arrest of appellee as a fugitive from justice was issued pursuant to the receipt from the Governor of the State of Georgia, in the form and manner provided by Art. IV, Section 2, Clause 2, of the Constitution of the United States, and the Act of Congress Regulating Interstate Extraditions (Section 3182 of Title 18, U. S. C.). The District Court, on the other hand, upon the basis of non-acceptance of the scope of inquiry test then proceeded in paragraph 2 of the conclusions of law to construe the action of the Governor of the State of California in issuing the warrant as state action by the State of California within the meaning of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. In paragraph 3 of the conclusions of law the court construes also the action of the Governor of the State of California in issuing the warrant as action by the State of California for the purpose of effectuating the judgment and sentence of the Superior Court of Bibb County, State of Georgia, and that thereby the State of California became an ac-

tive participant in the effectuation of said judgment and sentence. In paragraphs 4 to 8, inclusive, of the conclusions of law the court determines that there were deprivations of constitutional rights of the appellee in the demanding state and that the judgments and sentences of the court of the demanding state were void. By paragraph 9 of the conclusions of law the action of the State of California is held to be void and without jurisdiction. Likewise, in paragraph 11 the action of the Governor of the State of California in issuing the warrant is construed as action of the State of California which was void and without jurisdiction, in that it deprived appellee of due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States. Likewise, in paragraph 12 of the conclusions of law the custody of appellee by appellant Sheriff is construed as void and without jurisdiction. In part 5 of the court's opinion incorporated as a conclusion of law by paragraph 14 of the conclusions of law as if set forth in haec verba, the due process clause of the Fourteenth Amendment of the Constitution of the United States is construed as prevailing over the provisions of Art. IV, Section 2, Clause 2, of the Constitution of the United States, and the Act of Congress Regulating Interstate Extraditions (Section 3182 of Title 18, U. S. C.). The judgment of the District Court nullifies the operating effectiveness of Art. IV, Section 2, Clause 2 of the Constitution of the United States,

and the Act of Congress Regulating Interstate Extraditions (Section 3182 of Title 18 U. S. C.).

V.

The District Court erred in nullifying the provisions of the California Uniform Extradition Act (Penal Code Sections 1548.2, 1549.2, 1549.3, and 1553.2) by determining that a Federal District Court in California may declare that a fugitive from the State of Georgia has been deprived of constitutional rights under the Fourteenth Amendment in the State of Georgia.

Sections 1548.2, 1549.2, 1549.3 and 1553.2 of the Penal Code of the State of California, which are provisions of the Uniform Extradition Act in force and effect in over half of the States of the Union are adversely affected by the ruling of the District Court to the extent that the operative effectiveness of such named provisions are nullified by the holding of the Court that such statutes were operative against appellee-petitioner, Sylvester Middlebrooks, Jr., for unconstitutional purposes and with unconstitutional results and in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States (See Part 5 of the court's opinion, incorporated as a conclusion of law in paragraph 14 of the conclusions of law as if set forth haec verba.) The court thereby erred in discharging the appellee from the custody of the appellant who held the appellee in custody in con-

formity with the requirements of the Uniform Extradition Act.

Dated this 16th day of June, 1950.

/s/ DAVID S. LICKER,
District Attorney of the
County of Santa Barbara.

/s/ VERN B. THOMAS,
Assistant District Attorney of the County of Santa Barbara.

Attorneys for Appellant John D. Ross, Sheriff of Santa Barbara County, California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 17, 1950.

No. 12572

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN D. ROSS, Sheriff of Santa Barbara County, State of California,

Appellant,

vs.

SYLVESTER MIDDLEBROOKS, JR.,

Appellee.

APPELLANT'S OPENING BRIEF.

DAVID S. LICKER,
District Attorney of the County of Santa Barbara,

VERN B. THOMAS,
Assistant District Attorney of the County of Santa Barbara.

Court House, Santa Barbara, California,
Attorneys for Appellant.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

PAGE

TABLE OF AUTHORITIES CITED.

PAGE

STATUTES

PAGE

TEXTBOOKS

No. 12572

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN D. ROSS, Sheriff of Santa Barbara County, State of California,

Appellant,

vs.

SYLVESTER MIDDLEBROOKS, JR.,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Pleadings and Facts Disclosing Basis of Jurisdiction.

The appellee-petitioner, Sylvester Middlebrooks, Jr., filed in the District Court of the United States, Southern District of California, Central Division, on November 21, 1949, a petition for a writ of habeas corpus [R. p. 2] against the appellant-respondent, John D. Ross, Sheriff of Santa Barbara County, State of California.

Summary of Petition.

The petition alleges in Paragraph I [R. p. 2] that the appellee was unlawfully imprisoned, detained and restrained of his liberty by the appellant, by virtue of warrant for extradition signed by the Honorable Earl Warren as Governor of the State of California.

Paragraph II(1)(a) [R. pp. 2, 3 and 4], in substance, alleges that the conviction of appellee and sentences which were imposed on burglary charges by the Superior Court of Bibb County, Georgia, were null and void, for the reason that his conviction was in violation of the due process clause of the Fourteenth Amendment of the Constitution, in that he was denied assistance of counsel. It is contended, furthermore, that he did not plead guilty, but was summarily convicted and sentenced after having been denied a trial.

Paragraph II(1)(b) [R. pp. 4, 5, 6] alleges that the judgment and sentence imposed upon him by the Georgia court violated the due process clause of the Fourteenth Amendment, in that it imposed upon him cruel and unusual punishment.

Paragraph II(2) [R. pp. 6, 7] contends that a violation of the due process clause would occur by appellee being returned to the State of Georgia, to effectuate a sentence of cruel and inhuman punishment; further, that appellee would be in grave danger of violence and possible loss of his life.

Paragraph II(3) [R. p. 7] alleges that the action of the Governor of California in issuing the warrant, and the action of the Sheriff under the warrant, is a violation of the due process clause of the Federal Constitution.

Paragraph II(4) [R. p. 7] alleges that the appellee's presence in the State of California was not due to his voluntary act, but compulsion by the United States Army, who transported him involuntarily to Camp Cooke from another state.

Paragraph II(5) [R. p. 8] alleges that the appellee was once in jeopardy for the same crimes for which he was convicted on or about the 8th day of February, 1935.

Paragraph II(6) [R. p. 8] alleges that prior applications for writs of habeas corpus were made to the Superior Court, the District Court of Appeal, and the Supreme Court of California, and that each of such applications was denied.

Paragraph II(7) [R. p. 8] alleges that applications for stay of execution were made to the Supreme Court of California and the Supreme Court of the United States for the purpose of allowing appellee to file a petition for a writ of certiorari to the Supreme Court of the United States and that each of these applications was denied.

Summary of Return to Writ.

Appellant-respondent, John D. Ross, Sheriff of Santa Barbara County, California, filed a return [R. pp. 12 to 14 incl.] which alleged the following:

Paragraph I [R. p. 12] alleged, in substance, that the appellee was held in custody by the appellant Sheriff under and by virtue of a fugitive warrant issued by the Governor of California, and a true copy of such warrant was annexed to the return and marked Exhibit 1 [R. pp. 14, 15].

Paragraph II of the return [R. pp. 12, 13] alleged that the Governor of the State of Georgia made a written demand for the extradition of appellee as a fugitive from justice from the State of Georgia, the demand being accompanied by certain documents, including the indictment, judgments of conviction and other supporting papers certified as authentic, a true copy of such demand and accompanying written documents being annexed to the return and marked Exhibit 2 [R. pp. 16 to 40, incl.].

Paragraph III of the return [R. p. 13] denies, for lack of information or belief, the allegations of Para-

graphs I, II(1), (a), (b), (2), (3), (4), (5), and (7) of the petition.

Paragraph IV of the return [R. pp. 13, 14] raised the issue that the petition for a writ did not state facts sufficient to constitute a cause of action against the appellant, and a memorandum of points and authorities was filed in support of this issue.

Summary of Traverse.

Appellant stipulated [R. p. 107] that the matter set forth in the return of the Sheriff could be considered denied by the petitioner. The Court ruled, however, as follows [R. pp. 107, 108]:

> "The Court: The stipulation that they be denied is all right as far as it goes. But as to any affirmative matters, the court will treat the petition as the traverse. That has been the practice around here. It raises the same issues and your record then is in proper shape."

Summary of Proceeding.

The proceeding came on for hearing before the Honorable James E. Carter, District Judge of the United States of America, Southern District of California, Central Division, on the 20th day of December, 1949. The Court took the matter under submission after the introduction of testimony and evidence, arguments of counsel and submission of briefs. The Court, thereafter, on February 3, 1950, rendered its decision and opinion in favor of the appellee [R. pp. 45 to 77, incl.] and directed appellee to submit findings of fact, conclusions of law

and judgment, for the approval of the Court. On February 7, 1950, the Court ordered the release of appellee on bond [R. pp. 78 to 80, incl.] prior to the approval of findings and entry of judgment and pending any appeal of the case upon the entry of judgment in the proceeding. On May 2, 1950, the District Court approved findings of fact, conclusions of law and entered judgment in favor of the appellee and ordered the discharge of the appellee from the custody of the appellant Sheriff.

Appellant upon the entry of judgment on May 2, 1950, in the proceedings, filed in the District Court on the 8th day of May, 1950, an application for the issuance of a certificate of probable cause for an appeal [R. pp. 94 to 100, incl.]. The District Judge, James E. Carter, who had rendered the judgment in the proceedings, thereupon issued, on the 8th day of May, 1950, a certificate of probable cause on appeal [R. pp. 100, 101]. Appellant thereupon filed in the District Court, in and for the Southern District of California, Central Division, on the 11th day of May, 1950, a notice of appeal [R. p. 102], filed also on the 12th day of May, 1950, notice of the contents of the record to be prepared [R. pp. 103, 104] and paid all required fees and furnished a bond securing the cost of preparation of the record.

Appellant filed with the Clerk of the United States Court of Appeals for the Ninth Circuit notice of the contents of the record to be printed [R. pp. 225, 226], and filed a statement of points on appeal [R. pp. 227 to 237, incl.], and paid all required fees and estimated costs of printing the record.

The jurisdiction of District Courts of the United States to issue writs of habeas corpus is set forth in subdivision (a) of Section 2241 of Title 28, U. S. C. A., which reads as follows:

> "2241. Power to grant writ.
>
> "(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had."

The appellate review of the final order of a district judge in a habeas corpus proceeding is provided for in the following designated statutory provisions.

Section 1291 of Title 28, U. S. C. A., reads as follows:

> "1291. Final decisions of district courts.
>
> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Section 2253, Title 28, U. S. C. A., reads as follows:

> "2253. Appeal.
>
> "In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to

review, on appeal, by the court of appeals for the circuit where the proceeding is had.

"There shall be no right of appeal from such order in a proceeding to test the validity of a warrant of removal issued pursuant to section 3042 of Title 18 or the detention pending removal proceedings.

"An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause."

George F. Langsdorf, Librarian, Ninth U. S. Court of Appeals, in an article entitled "Habeas Corpus and Protean Writ and Remedy," cited in 8 F. R. D. 179, 189-190, discussed the origin and changes made in Federal statutory provisions for appellate review of habeas corpus proceedings. At page 190 the writer said:

"'All final decisions' by district courts, including of course those in habeas corpus cases when heard on the writ and return, are appealable to the proper Court of Appeals, save those appealable directly to the Supreme Court (28 U. S. C. A. Sec. 225(a), now become Revised 28, U. S. C. A., Sec. 1291). The great change effected by creation of a right of appeal in these terms was to elevate the issuance or refusal of the writ into a proceeding and order having finality for purpose of review. . . ."

Abstract of Statement of Case Presenting the Questions Involved and the Manner in Which They Are Raised.

The Governer of California on the 13th day of September, 1949, issued his warrant authorizing the arrest of appellee, Sylvester Middlebrooks, Jr., as a fugitive from justice of the State of Georgia [Respondent's Exhibit 1 attached to the return, R. pp. 14, 15]. Appellant, John D. Ross, Sheriff of Santa Barbara County, State of California, thereupon apprehended and took into custody on the 21st day of September, 1949, the appellee.

The fugitive warrant of the Governor of California was issued pursuant to the receipt of a written demand by the Hon. Herman E. Talmadge, Governor of the State of Georgia, certified by him as authentic, for the extradition of appellee as a fugitive from justice from the State of Georgia. The demand [R. pp. 16, 17] was accompanied with the following papers:

(1) Application for extradiction to the Governor of Georgia by the State Board of Corrections by its chief clerk [R. pp. 18 to 21, incl.]. This authenticated document recites, in part:

> ". . . That Sylvester Middlebrooks was convicted at the February (1935) term(s), Bibb County Superior Court(s), State of Georgia, a Court (or Courts) having jurisdiction thereof, of Burglary (5 counts) and was sentenced thereupon by the Hon. W. A. McClellan, Judge presiding, to One to One year in each of Five (5) Counts, one to follow the other in the penitentiary of Georgia.
>
> "By virtue of said sentence(s) the said Sylvester Middlebrooks was received in the penitentiary February 8th, 1935, and while confined in said penitentiary

escaped from Walton County Public Works Camp, Monroe, Georgia, a branch of the Georgia penitentiary, on July 13, 1939 and fled the State and is now a fugitive from justice and has been recaptured and is being held by Police Department, Camp Cooke, California under the name of Sylvester Middlebrooks . . ."

(2) An indictment by the Grand Jury of Bibb County, Georgia, during the November 1934 term, charging Sylvester Middlebrooks, Jr., with five counts of burglary [R. pp. 21 to 28, incl.].

(3) Five judgments of conviction of appellee and sentences imposed on a plea of guilty to each of the five counts of the indictment [Respondent's Exhibit 2, R. pp. 28 to 40, incl.].

The demand of the Governor of Georgia filed with the office of the Governor of California [R. pp. 16, 17] certified to the correctness of all above referred to documents.

The indictment discloses that the appellee summarily waived arraignment and plead guilty under each of the counts of the indictment on February 8, 1935 [last page of indictment, R. p. 27].

The authenticated judgments of conviction and sentences imposed involving each count of the indictment also show that he pleaded guilty on February 8, 1935, and was thereupon committed for one year on each of the five counts, to run consecutively.

The demand and supporting papers filed by the Governor of Georgia bear the approval under date of September 6, 1949, of Frederick N. Howser, Attorney General of the State of California, by a named deputy.

Appellee escaped confinement, according to his testimony, on or about the year 1937 and went to South

Carolina where he was arrested and convicted of a felony in Columbus, South Carolina, on charges of house-breaking and grand larceny and sentenced to a chain gang [R. p. 159]. Upon completion of his sentence in South Carolina he was again arrested by the Georgia authorities for completion of the sentence on the five burglary charges [R. p. 160]. While so confined he again escaped from the Walton County Public Works Camp, Monroe, Georgia, a branch of the Georgia penitentiary, July 13, 1939, and fled the State of Georgia [Exhibit 2 attached to return, R. p. 18], and admission of appellee of escape [R. p. 161]. Appellee subsequently enlisted in the Army of the United States, deserted and three and one-half years after the desertion was apprehended and court-martialed. The sentence imposed was 15 years, but was subsequently reduced to a sentence of approximately 41 months [R. pp. 161, 162].

It was while so confined in the U. S. Disciplinary Barracks at Camp Cooke, California, that the Governor of Georgia made a formal request of extradition in accordance with Article IV, Section 2, Clause 2, of the Constitution of the United States, in the form and manner provided by the Act of Congress regulating interstate extraditions (Sec. 3182 of Title 18, U. S. C.) (for the arrest of appellee as a fugitive from justice of the State of Georgia), and in conformance with Section 1548.2 of the Penal Code of California, one of the provisions of the Uniform Extradition Act.

Appellee, upon his being taken into custody by the appellant Sheriff of Santa Barbara County, California, under authority of the fugitive warrant issued by the Governor of California, then filed a petition for a writ of habeas corpus in the County of Santa Barbara, and,

after hearing, the writ of habeas corpus was denied. Thereafter he filed applications for writs in the District Court of Appeal of California and the Supreme Court of California and the applications were denied. Appellee then sought a stay of rendition from the California Supreme Court, which was refused [R. p. 206]. Applications for similar stays of execution were similarly made to the Hon. William O. Douglas, Justice of the U. S. Supreme Court, and Hon. Hugo L. Black of the U. S. Supreme Court, which were denied [R. p. 207].

Appellee then on November 21, 1949, made application to the District Court of the United States, Southern District of California, Central Division, for a writ of habeas corpus [R. p. 2].

The petition sought a hearing and determination by the District Court on issues involving the constitutional validity of the phases of the penal action and proceedings by the demanding state, Georgia, in respect to the fugitive appellee and his conviction for offenses in that state, in addition to the validity of punishment inflicted and allegedly threatened by the demanding state. The petition has heretofore been summarized in detail in the statement of the pleadings. The petition fails to allege that appellee was not charged with crime in the demanding state or that appellee was not a fugitive from the demanding state.

The return of the appellant Sheriff alleged the custody of appellee under authority of the warrant issued by the Governor of California on demand of the Governor of Georgia.

Paragraph IV of the return requested the dismissal of the petition for a writ for the reason the petition did not state facts sufficient to constitute a cause of action upon which relief could be granted. Motions requesting the discharge of the writ were also made on this ground and

also on jurisdictional grounds, during the trial, which will be referred to in our specifications of errors. Likewise, appellant objected to the introduction of testimony and evidence offered and received on such above referred to grounds, and also motions to strike such testimony and evidence were made on behalf of appellant during the trial. The specifications of error will refer in detail to such matters. All such motions and objections and motions to strike were taken under submission by the Court and subsequently overruled by paragraph 15 of the Court's conclusions of law [R. p. 92]. The Court rendered its opinion on February 3, 1950, in favor of the appellee, and subsequently, on May 2, 1950, approved findings of fact and conclusions of law, and entered judgment which ordered the discharge of the appellee from custody of the appellant Sheriff.

The District Court in this proceeding refused to test the asylum state's arrest and detention of petitioner for extradition purposes within the established scope of inquiry rule applicable to extradition proceedings. The Court, on the other hand, assumed jurisdiction to test the validity of the proceedings of the Georgia court with respect to the appellee and his offenses, and to test the validity of the punishment imposed, and contemplated incarceration if returned to the demanding state to complete the terms of his conviction for such offenses.

The effect of the failure of the Court to apply the limited scope of inquiry rule to this rendition matter was the commission of error by the Court in nullifying the operating effectiveness of Article IV, Section 2, Clause 2, of the Constitution of the United States, the Act of Congress regulating interstate extraditions (Sec. 3182 of Title 18, U. S. C.) and the following provisions of the Penal Code of California: Sections 1548.2, 1549.2, 1549.3

and 1553.2,* which are provisions of the Uniform Extradition Act in force and effect in California.

The first basic question involved on this appeal, therefore, is as follows: Did the District Court properly interpret and construe the provisions of Article IV, Section 2, Clause 2, of the Constitution of the United States and the Act of Congress regulating interstate extraditions (Sec. 3182 of Title 18, U. S. C.) and provisions of the Penal Code of the State of California, Sections 1548.2, 1549.2, 1549.3 and 1553.2, in hearing and determining the constitutional validity of the penal action by the demanding state in respect to the appellee and his offenses and punishment therefor. Appellant's first specification of error bears upon this question, and errors in six subdivisions have been designated, which arise by reason of the non-acceptance and violation by the Court of the limited scope of inquiry rule applicable to extradition proceedings. Argument No. 1 pertains to this specification of error.

The second question involved on this appeal is whether at the rendition stage relief to appellee was available in the District Court on the issues presented by the petition without first having exhausted the remedies of the demanding state, Georgia. The second specification of error and argument thereto bears upon this question.

The third question involved on this appeal is whether certiorari to the United States Supreme Court from a judgment by the Supreme Court of California denying relief to appellee was a prerequisite to adequately exhausting the remedies of the asylum state, California. Appellant's third specification of error and argument has reference to this question.

---

*(All such designated provisions are quoted in full in the Appendix to this brief.)

SPECIFICATIONS OF ASSIGNED ERRORS RELIED UPON AND REFERENCE TO THE RECORD WHERE SUCH ASSIGNMENTS APPEAR.

I.

The District Court Erred in Hearing and Determining in the Asylum State the Constitutional Validity of Phases of the Penal Action by the Demanding State in Respect to the Fugitive and His Offenses.

Errors in this category are listed in six subdivisions, as follows:

Subdivision 1.

The judgment of the Court based upon the Court's findings of fact and conclusions of law ordering that petitioner be unconditionally released from custody [R. p. 93] was contrary to law, by reason of the Court's non-acceptance and violation of the limited scope of inquiry rule applicable to rendition matters as determined by the Supreme Court of the United States, based upon construction and interpretation of the requirements of Article IV, Section 2, Clause 2, of the Constitution of the United States, and the Act of Congress regulating interstate extraditions.

The scope of inquiry of a petition for a writ of habeas corpus in cases having an extradition base is limited under authority of such named provisions to the following questions: (a) Whether the person demanded has been substantially charged with crime, and (b) whether he is a fugitive from justice of the demanding State.

Subdivision 2.

The District Court erred in overruling the motion of appellant to discharge the writ on the ground that the petition did not state facts sufficient to constitute a cause of action against the appellant Sheriff of Santa Barbara County, California, by reason of failure of said District Court to apply the rule limiting the scope of inquiry for extradition purposes.

Record, page 120, discloses the following motion on behalf of appellant at the close of counsel for appellee's opening statement:

> "Mr. Thomas: At this time the respondent sheriff, your Honor, will move the court to discharge, dismiss the writ issued in this case, on the ground that the petition for a writ and counsel's opening statement, neither, state facts sufficient to constitute a cause of action.
>
> "If I may at this time, your Honor, I would like to discuss authorities dealing with the matter."

The Court did not rule on this motion, but took the same under submission, and overruled same in paragraph 15 of the Court's conclusions of law [R. p. 92].

Counsel for appellee's opening statement [R. pp. 108 to 120, incl.] summarizes allegations of the petition to the effect that there were deprivations of alleged constitutional rights committed by the courts and penal system of the demanding State. No issue was raised in the opening statement contending that appellee was not charged with crime in the demanding State, that appellee was not the person named in the rendition papers, that appellee was not present in the demanding State at the time of the commission of the alleged offenses, or that appellee was

not a fugitive from the State of Georgia within the established definition of a fugitive from justice.

Paragraph IV of the return [R. pp. 13, 14] raised the same issue, and reads as follows:

> "That I, John D. Ross, Sheriff of Santa Barbara County, California, do make the further return that the petition for a writ does not state facts sufficient to constitute a cause of action against this respondent. Your attention is respectfully directed to the Memorandum of Points and Authorities in Opposition to the Petition for Writ of Habeas Corpus filed on behalf of respondent with respect to the points involved."

Subdivision 3.

The District Court also erred in overruling appellant's objections to the introduction of testimony and evidence offered by appellee, by reason of failure to apply the rule of limiting the scope of inquiry for extradition purposes.

Appellant objected to the testimony of Sylvester Middlebrooks, Jr., appellee, upon his being called to testify [R. p. 122], as follows:

> "Mr. Thomas: At this time, your Honor, the respondent sheriff will object to the introduction of any evidence on the ground that the petition and counsel's statement, opening statement, do not constitute a cause of action, and the witness' testimony would be immaterial and not bear on any issue involved."

It was stipulated that appellant's objection might go to all testimony from the named witness without having to be repeated. The appellee was thereupon permitted to testify, in summary, as follows:

That he was born February 11, 1917, in Macon, Bibb County, Georgia, where he resided continuously until he

was arrested in 1931 or 1932 on burglary charges and sent to a reformatory by the Juvenile Court [R. pp. 124, 125]. The Court admitted in evidence Petitioner's Exhibit 1, subject to objections of counsel for the appellant [R. p. 126] theretofore made. The exhibit purported to be a certified copy of the juvenile case record of Sylvester Middlebrooks, Jr., and stated at Record, page 127:

> "Testimony of Sylvester Middlebrooks, Jr.
>
> Report of investigation, admits aiding and leading in 8 burglaries—Mrs. Bishop, J. A. Smith, A. W. McClure, J. A. Hunt, Clifford McKay, Mr. Chandler and two houses he pointed out.
>
> Date of hearing, January 7, 1932.
>
> Disposition, committed to Georgia Training School for Boys.
>
> Certified to be a true copy.
>
> /s/ Alice Denton,
> Clerk of Juvenile Court,
> Bibb County, Georgia."

That he remained at the reformatory about 3½ months, escaped and was rearrested and sent to the reformatory again, and again escaped [R. pp. 128, 129]; that in June or July, 1934, he was arrested on the burglary charges involved in an indictment and taken before a judge on February 8, 1935 [R. p. 133]; that he was not represented by an attorney at the proceedings on the indictment [R. p. 135]; that he did not plead guilty [R. p. 136]; that he was not asked by the Court whether he plead guilty or not guilty [R. p. 136] and was sentenced by the Court to 5 years in the Georgia state prison [R. p. 135]; that he was thereupon committed to the Walton County prison at Monroe, Georgia [R. p. 140]; the witness described the

nature of the housing facilities provided at such prison [R. pp. 140, 141]; testified with respect to working conditions [R. pp. 142, 143]; testified regarding the type of food served to inmates [R. pp. 143, 144]; testified that the guards carried guns and sticks [R. p. 145]; that he and other prisoners had been beaten by the guards [R. p. 145]; that shackles were used on the prisoners [R. p. 147]; described sanitary conditions [R. pp. 148 to 150, incl.]; that stocks were used [R. p. 152]; that sweat boxes were used, and details with regard to the use [R. pp. 154 to 156, incl.].

The witness further testified that in March, 1937, he escaped and went to South Carolina [R. p. 159] and was arrested and convicted there of breaking into an inhabited dwelling house [R. p. 159] and was sentenced to 18 months on a South Carolina chain gang [R. p. 159]; that upon completion of his sentence in South Carolina he was again apprehended by the Georgia authorities and taken back to the Walton County chain gang in the year 1938 [R. p. 160]; that after he had been there about a year he again escaped and went to New York [R. p. 161] and enlisted in the Army on April 23, 1942; went A. W. O. L. in August, 1942, for 3½ years [R. p. 161]; that he was court-martialed by the Army authorities in August, 1946, and dishonorably discharged [R. p. 161] and the sentence imposed was 15 years, but was reduced to 41 months [R. p. 161].

The witness further testified that part of his Army sentence was served at Stonewall, New York, and the balance of his sentence was served at Camp Cooke, California [R. p. 165].

The witness further testified that he escaped from the Georgia prison on July 13, 1939 [R. p. 162].

At the completion of the appellee's direct testimony appellant's counsel [R. p. 168] made the following motion:

> "Mr. Thomas: At this time, your Honor, on behalf of the respondent I move to strike the evidence of the witness on the following grounds: The evidence is incompetent, irrelevant and immaterial;
>
> "(2) Neither the petition requesting a writ, nor counsel's opening statement, states sufficient facts to constitute a cause of action which would warrant the granting of a writ;
>
> "(3) That the proffered testimony raises issues which are beyond the scope of the jurisdiction of this Court."

The Court took the matter under submission [R. p. 169].

Horace B. Conkle was then called as a witness on behalf of appellee and, after being duly sworn, the following objection to the testimony was made [R. p. 170], as follows:

> "Mr. Thomas: Just a moment, please. At this time I would like to renew the motion heretofore made with respect to the first witness' testimony, on the ground that neither the petition nor counsel's opening statement states a cause of action which would warrant the granting of a writ.
>
> "The Court: The objection is taken under submission, and by a stipulation of counsel it may go to the entire line of testimony.
>
> "Mr. McTernan: So stipulated."

Horace B. Conkle was thereupon permitted to testify as follows: That he was convicted of the crime of burglary in Georgia in 1934 [R. p. 171]; that he was confined, following his sentence, in Colquitt County prison, Georgia [R. p. 172]; described the housing facilities at such prison [R. pp. 172 to 175, incl.]; testified as to the use of shackles at such prison [R. pp. 175 to 177, incl.]; testified regarding food conditions in such prison [R. pp. 178 to 179]; testified regarding working conditions at such prison [R. p. 179]; testified regarding the beating of prisoners by guards [R. p. 181]; testified regarding punishment practices [R. pp. 182 to 189, incl.].

Appellant's counsel at the completion of the witness' testimony made a motion to strike, as follows [R. p. 189]:

> "Mr. Thomas: The respondent at this time will move the court to strike the testimony of the witness on the following grounds: that the testimony is incompetent, irrelevant and immaterial to any valid issue before the court; secondly, on the ground that the petition in this case and counsel's opening statement does not state facts sufficient to constitute a cause of action; and, thirdly, the testimony bears upon issues which are beyond the scope of the jurisdiction of this court."

The same named witness, Horace B. Conkle, was permitted to further testify, over objection of appellant [R. p. 191], that after completion of his term of sentence in July of 1939, he returned to the State of Georgia for a visit in 1945 or 1946 [R. p. 191]; that he observed no brutality on this visit [R. p. 192]; that the guards were still armed with shotguns, rifles and pistols [R. p. 192].

At Record, page 192, counsel for the appellant renewed his motion to strike, as follows:

> "Mr. Thomas: We will renew our motion to strike the witness' testimony to the last few questions, your Honor, on the same grounds as heretofore set forth.
>
> "The Court: The motion will be taken under submission."

The appellee then offered in evidence a report as it appeared in the San Francisco News, which purported to be a report of the President's Committee on Civil Rights, according to counsel for appellee. Record, page 199, shows objection on behalf of the appellant, as follows:

> "Mr. Thomas: To which the respondent objects on the ground that the proffered testimony is incompetent, irrelevant and immaterial."

The excerpt makes reference to the killing of eight negro prisoners in the State Highway Camp in Glynn County, Georgia, on July 11, 1947, who were killed as they allegedly attempted to escape. The excerpt stated that the Glynn County Grand Jury exonerated the warden of the camp and four guards of all charges, but makes reference to conflicting evidence presented to the State Board of Corrections in its investigation where one witness testified that the prisoners were not trying to escape [R. pp. 201 to 203, incl.].

Appellant moved to strike such excerpt from the record, as follows [R. p. 203]:

> "Mr. Thomas: At this time respondent moves to strike the excerpts read on the ground that the testimony is incompetent, irrelevant and immaterial.

"The Court: And upon all the other grounds you have previously stated?

"Mr. Thomas: That's right.

"The Court: I will reserve ruling on that motion, too."

The District Court by its conclusion of law No. 15 [R. pp. 92, 93] overruled all objections and motions to strike made by appellant and taken under submission by the Court and not ruled upon during the trial.

The Court thereby erred in failing to apply the rule limiting the scope of inquiry applicable to extradition cases.

Subdivision 4.

The non-acceptance and violation of the scope of inquiry rule by the Court is also the basis of appellant's position on this appeal that the Court erred in the following designated findings of fact and conclusions of law:

The last sentence of Finding of Fact No. 2 [R. p. 83] wherein the District Court construes the rendition proceeding as being one for the purpose of enforcing a judgment and sentence of the Superior Court of Bibb County, State of Georgia, as more particularly described in subsequent findings.

Finding of Fact No. 3 [R. p. 83] finds that the appellee was not represented by an attorney at the proceedings upon the indictment before the Superior Court of Bibb County, Georgia, on February 8, 1935.

Finding of Fact No. 4 [R. p. 84] finds that appellee did not plead guilty to the indictment and was denied a trial by the Superior Court of Bibb County, Georgia [R. p. 84].

Finding of Fact No. 5 and Finding of Fact No. 6 [R. pp. 84, 85, 86] involve a determination by the Court of

nature of punishment sustained by appellee while confined in the Walton County Works Camp of the State of Georgia, a branch of the penitentiary.

Finding of Fact No. 8 [R. p. 86] involves a determination by the Court that if appellee were returned to the State of Georgia upon requisition he would again be subjected to the practices referred to in paragraph 5 of the Findings of Fact. The record is barren of any evidence pertaining to the penal methods and practices in vogue as of the date of the trial on December 20, 1949, or for several years prior thereto.

Finding of Fact No. 12 [R. p. 88] adopts *haec verba*, by reference, all findings of fact contained in the opinion of the Court filed on February 3, 1950.

Conclusion of Law No. 2 [R. p. 89] construes the action of the Governor of California in issuing a warrant for appellee's arrest on the demand of Georgia as State action by California within the meaning of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

Conclusion of Law No. 3 [R. p. 89] construes the action of the Governor of California in issuing the fugitive warrant as State action by California for the purpose of effectuating the judgment and sentence of the Superior Court of Bibb County, Georgia, on February 8, 1935, and that thereby the State of California became an active participant in the effectuation of said judgment and sentence.

Conclusion of Law No. 4 [R. p. 89] determines that the Superior Court of Bibb County, State of Georgia, failed to afford appellee counsel and thereby deprived him of due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

Conclusion of Law No. 5 [R. pp. 89, 90] determines that the judgment and sentence imposed without a plea of guilty was in violation of the Fourteenth Amendment of the Constitution of the United States.

Conclusion of Law No. 6 [R. p. 90] and Conclusion of Law No. 7 [R. p. 90] make determination that appellee was subjected to cruel, unusual and inhuman punishment, in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

Conclusion of Law No. 8 [R. p. 90] involves a determination by the Court that the judgment and sentence of the Superior Court of Bibb County, Georgia, was void and without jurisdiction.

Conclusion of Law No. 9 [R. p. 91] construes the action of the State of California as void and without jurisdiction.

Conclusion of Law No. 11 [R. p. 91] involves a determination that the appellee, if returned to Bibb County, Georgia, would be again subjected to cruel, unusual and inhuman punishment, in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States; and that the action of California was void and without jurisdiction and violated the Fourteenth Amendment.

Conclusion of Law No. 12 [R. p. 92] construes the custody of appellee by appellant sheriff, under authority of the fugitive warrant issued by the Governor of California, as void and without jurisdiction.

Conclusion of Law No. 13 [R. p. 92] makes determination that the appellee was entitled to his immediate and unconditional release.

Conclusion of Law No. 14 [R. p. 92] incorporates as if set forth *haec verba* the conclusions of law contained in the opinion of the District Court filed February 3, 1950.

The Court thereby erred in each and all of such above designated findings of fact and conclusions of law, by reason of failing to apply the rule of limiting the scope of inquiry for extradition purposes as required by the provisions of Article IV, Section 2, Clause 2, of the Constitution of the United States, and of the Act of Congress regulating interstate extraditions. (Section 3182, Title 18, U. S. C.)

Subdivision 5.

The District Court erred in nullifying the provisions of Article IV, Section 2, Clause 2, of the Constitution of the United States, and the Act of Congress regulating interstate extraditions (Section 3182 of Title 18, U. S. C.), by determining in the asylum state that a fugitive had been deprived of constitutional rights under the Fourteenth Amendment of the Constitution of the United States.

In Part V of the Court's opinion [R. pp. 69, 70] incorporated as a conclusion of law by Paragraph 14 of the Conclusions of Law [R. p. 92] as if set forth *haec verba* in the Conclusions of Law, the District Court erred in determining that the rendition of appellee was violative of the due process clause of the Fourteenth Amendment of the Constitution of the United States. Appellant incorporates by reference, to avoid repetition, the summary of Conclusions of Law as designated in Subdivision 4 of the First Specification of Error wherein, similarly, the Court made determination that the rendition of appellee was vio-

lative of the due process clause. The Court thereby erred in nullifying the operating effectiveness of Article IV, Section 2, Clause 2 of the Constitution of the United States and the Act of Congress regulating interstate extraditions (Section 3182 of Title 18, U. S. C.) by failing to accept and apply the limited scope of inquiry rule applicable to extraditions.

Subdivision 6.

The District Court erred in nullifying the provisions of the California Uniform Extradition Act (Penal Code, Secs. 1548.2, 1549.2, 1549.3 and 1553.2) by determining that a federal court in California may declare that a fugitive from the State of Georgia has been deprived of constitutional rights under the Fourteenth Amendment of the Constitution of the United States in the State of Georgia.

Sections 1548.2, 1549.2, 1549.3 and 1553.2 of the Penal Code of the State of California, which are provisions of the Uniform Extradition Act in force and effect in over half of the states of the Union, are adversely affected by the ruling of the District Court, to the extent that the operative effectiveness of such named provisions is nullified by the holding of the Court that such statutes were operative against appellee for unconstitutional purposes and with unconstitutional rights, and in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

Part V of the Court's opinion [R. pp. 69, 70], incorporated as a conclusion of law by paragraph 14 of the Conclusions of Law [R. p. 92] as if set forth *haec verba.*

Each of the sections of the California Penal Code referred to are quoted in full in the argument to the first specification of error at pages 39 to 41 of this brief.

Summary of Argument to First Specification of Error.

The demand of the Governor of Georgia, accompanied by the requisite authenticated documents, invoked into operation the provisions of Article IV, Section 2, Clause 2, of the Constitution of the United States, and the Act of Congress regulating interstate extraditions. (Section 3182 of Title 18, U. S. C.)

Finding of Fact No. 2 [R. pp. 82, 83] involved a determination by the Court that the appellee had been arrested and was being held in custody by the appellant Sheriff of Santa Barbara County, California, under and pursuant to a warrant of arrest issued by the Governor of Georgia, upon written requisition of the Governor of the State of Georgia, certified as authentic; that the requisition was accompanied with a copy of an indictment charging appellee with the commission of five counts of burglarly, a copy of the judgments of conviction and sentence of appellee on each of five counts of burglary, each of which accompanying documents was certified as authentic.

Finding of Fact No. 7 [R. p. 86] acknowledges that the appellee escaped from the Walton County Public Works camp on or about July 13, 1939, and fled the State of Georgia.

The demand of the Governor of Georgia, accompanied by all requisite documents for the extradition of appellee as a fugitive from justice from the State of Georgia, invoked into operation the provisions of Sections 1548.2, 1549.2, 1549.3 and 1553.2 of the Penal Code of California, which are provisions of the Uniform Extradition Act, in

aid of the Act of Congress regulating interstate extraditions.

The scope of inquiry in an application for *habeas corpus* in cases having an extradition base for testing asylum state's arrest and detention for extradition purposes is limited to the following questions: (1) whether the person demanded has been substantially charged with a crime in the demanding state, and (2) whether he is a fugitive from justice of the demanding state.

The District Court refused to test the asylum state's arrest and detention for extradition purposes within the scope of inquiry applicable to such proceedings and proceeded to hear and determine the constitutional validity of phases of the penal action by the demanding state in respect to the fugitive and his offenses.

The failure of the Court to apply the well established limited scope of inquiry rule applicable to extradition proceedings resulted in a nullification of the operating effectiveness of the provisions of Article IV, Section 2, Clause 2 of the Constitution of the United States and the Act of Congress regulating interstate extraditions.

The Court erred in determining that Sections 1548.2, 1549.2, 1549.3 and 1553.2 of the Penal Code of California were operative against appellee for unconstitutional purposes and with unconstitutional results and violated the due process clause of the Fourteenth Amendment.

Argument to Specification of Error No. 1.

The Court erred in hearing and determining in the asylum state the constitutional validity of phases of the penal action by the demanding state in respect to the fugitive and his offenses. The argument on this specification of error is applicable to subdivisions 1 to 6, inclusive, of the first specification of error and, for brevity's sake, such subdivisions are not at this point repeated.

1.

The demand of the Governor of Georgia, accompanied by all requisite authenticated documents, invoked into operation the provisions of Article IV, Section 2, Clause 2, of the Constitution of the United States, and the Act of Congress regulating interstate extraditions (Sec. 3182 of Title 18, U. S. C.).

Article IV, Section 2, Clause 2, of the Constitution of the United States provides:

> "The person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the state from which he fled be delivered up, to be removed to the State having jurisdiction of the crime."

The return of fugitives is a matter of rightful demand by this provision of the Constitution. The Constitution makes that obligatory which would otherwise have to be based on interstate comity, courtesy, agreement or contract.

The Supreme Court of the United States in *Kentucky v. Dennison,* 24 Howe 66, at page 100, 16 L. Ed. 717,

65 U. S. 66 (1860), in discussing the history and purpose of this constitutional provision said:

> "It is manifest that the statesmen who framed the constitution were fully sensible, that from the complex character of the government, it must fail unless the states mutually supported each other and the general government; and that nothing would be more likely to disturb its peace, and end in discord, than permitting an offender against the laws of a state, by passing over a mathematical line which divides it from another, to defy its process, and stand ready, under the protection of the state to repeat the offense as soon as another opportunity offered."

In *Lascelles v. Georgia* (1893), 148 U. S. 537, 542, 37 L. Ed. 549, the Court said:

> "The sole object of the provision of the constitution and the act of Congress to carry it into effect . . . is to secure the surrender of persons accused of crime, who have fled from justice of a state, whose laws they are charged with violating. . . . No purpose or intention is manifested to afford them any immunity or protection from trial and punishment for any offenses committed in the state from which they flee."

The provisions of the Constitution for extradition, being general only and not self-executing, the duty of providing by law the regulations necessary to carry the provisions into execution devolve upon Congress according to decisions of the Supreme Court of the United States.

> *Commonwealth of Kentucky v. Dennison, supra;*
> *Roberts v. Reilly* (1885), 116 U. S. 80;
> *Innes v. Tobin* (1916), 240 U. S. 127.

The Congress of the United States accordingly enacted legislation to effectuate the constitutional provision by prescribing the acts which were necessary to constitute a valid demand for the extradition of a fugitive. Section 3182, 18 U. S. C. (1948), formerly (1 Stat. 312—1793, Revised Stat. Sec. 5278, 18 U. S. C. Sec. 662), reads as follows:

> "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged."

The duty of a State to surrender a fugitive is clearly prescribed by the constitutional provision, Article IV, Section 2, Clause 2, when a demand is made by another State in the form and accompanied by the documents referred to in Section 3182, 18 U. S. C.

The Supreme Court of the United States has interpreted the constitutional provision, Article IV, Section 2,

Clause 2, and predecessor sections of Section 3148, Title 18, U. S. C., in clear and unambiguous language. Justice Holmes in the case of *Drew v. Thaw* (1914), 235 U. S. 432, 440, 59 L. Ed. 302, said:

> "When, as here, the identity of the person, the fact that he is a fugitive from justice, the demand in due form, the indictment by a grand jury for what it and the Governor of New York allege to be a crime in that state, and the reasonable possibility that it may be such, all appear, the constitutionally required surrender is not to be interfered with by the summary process of habeas corpus upon speculation as to what ought to be the result of a trial in the place where the constitution provides for its taking place. We regard it as too clear for lengthy discussion that Thaw should be delivered up at once."

It has been held by the Supreme Court of the United States that the duty to issue a warrant upon receipt of a proper requisition is ministerial (*Kentucky v. Dennison, supra*) and that although there is no authority whereby anyone may compel the Governor to issue his warrant, if he refused to do so, nevertheless the act is not a discretionary one. (*Drew v. Thaw, supra.*)

The Supreme Court of the United States in *Roberts v. Reilly* (1885), 116 U. S. 80, at page 95, interpreted the Congressional Act regulating interstate extraditions as follows:

> "The act of Congress Rev. Stat. 5278 makes it the duty of the executive authority of the state to which such person has fled to cause the arrest of the alleged fugitive from justice, whenever the executive authority of any state demands such person as a fugitive from justice, and produces a copy of an in-

dictment found or affidavit made before a magistrate of any state, charging the person demanded with having committed a crime therein, certified as authentic by the governor or chief magistrate of the state from whence the person so charged has fled."

The Supreme Court of the United States interpreted the congressional act regulating interstate extraditions in *Appleyard v. Massachusetts* (1906), 203 U. S. 222. At page 227 the Court said:

"A person charged by indictment or by affidavit before a magistrate with the commission within a state of a crime covered by its laws, and who, after the date of the commission of such crime leaves the state—no matter for what purpose or with what motive, nor under what belief—becomes, from the time of such leaving, and within the meaning of the Constitution and the laws of the United States, a fugitive from justice, and if found in another state must be delivered up by the governor of such state to the state whoses laws are alleged to have been violated, on the production of such indictment or affidavit, certified as authentic by the governor of the state from which the accused departed. Such is the command of the supreme law of the land, which may not be disregarded by any state. The constitutional provision relating to fugitives from justice, as the history of its adoption will show, is in the nature of a treaty stipulation entered into for the purpose of securing a prompt and efficient administration of the criminal laws of the several states—an object of the first concern to the people of the entire country, and which each state is bound, in fidelity to the Constitution to recognize. A faithful, vigorous enforcement of that stipulation is vital to the harmony and welfare of the state. And while a state should take

> care, within the limits of the law, that the rights of its people are protected against illegal action, the judicial authorities of the Union should equally take care that the provisions of the Constitution be not so narrowly interpreted as to enable offenders against the laws of a state to find a permanent asylum in the territory of another state."

In *McNichols v. Pease* (1907), 207 U. S. 100, the Court at page 112 said:

> "When a person is held in custody as a fugitive from justice under an extradition warrant, in proper form, and showing upon its face all that is required by law to be shown as a prerequisite to its being issued, he should not be discharged from custody unless it is made clearly and satisfactorily to appear that he is not a fugitive from justice within the meaning of the Constitution and laws of the United States."

The case of *Johnson v. Matthews,* decided May 1, 1950, 182 F. 2d 677, by the United States Circuit Court of Appeals for the District of Columbia, involves the identical issues as are presented on this appeal. The Court stated in its opinion, at page 679, as follows:

> "The Supreme Court has established the scope of the extradition inquiry and the issues which are presented by it. The state cases and other federal court cases upon the subject are myriad. In essence the rule is that the court may determine whether a crime has been charged in the demanding state, whether the fugitive in custody is the person so charged, and whether the fugitive was in the demanding state at the time the alleged crime was committed.

"The question before us is whether a court (either state or federal) in the asylum state can hear and determine the constitutional validity of phases of the penal action by the demanding state in respect to the fugitive or his offense. We think that it cannot do so. Authorities, sound theory of government, and the practical aspects of the problem all require that conclusion.

"The problem is not merely one of *forum non conveniens*. It involves the interrelationship of governments, both among the states and between the states and the Federal Government."

The Court also stated at page 680:

"While the provision of the Constitution, being specific in its reference to 'State,' may not apply to the District of Columbia, the same basic theory underlies the federal statute which clearly does apply. Both Constitution and statute are explicit and mandatory. They require—not merely suggest—that the fugitive, having been secured, be delivered to the demanding state."

We have included the opinion of the Court in *Johnson v. Matthews* in Appendix "B" to this brief commencing at page 4.

The District Court of Appeal of the State of California, Second Appellate District (Division 1), on July 19, 1950, in the case of *In re Backstron aka Scott* (1950), 98 A. C. A. 701, rejected the application of Eugene Backstron, also known as Nathan Scott, for a writ of habeas

corpus. The issues involved were identical with many of the issues presented for a writ in the instant case. The Court, in reviewing the allegations of the petition, said:

> "The petition alleges that petitioner is 'unlawfully restrained of his liberty . . . by virtue of a warrant for extradition . . . pursuant to a demand . . . by the Governor of the State of Mississippi.'
>
> "In substance it is alleged that the conviction in Mississippi was unlawful and in violation of the Fourteenth Amendment in that 'petitioner was sentenced by said court by use of a forced confession'; that petitioner was denied counsel; that the judgment, 'imposed upon the petitioner cruel and inhuman punishment' in connection with which many details were alleged; that 'for this court to render a judgment that will allow the agents of the State of Mississippi to take the petitioner into custody would violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, and the United Nations Charter, in that this would constitute state action of the State of California and would directly cause his return to the State of Mississippi to effectuate a sentence of cruel and inhuman punishments . . . for he, a Negro, has challenged the State of Mississippi, its brutality which is permeated by hatred of the Negro, and its open vicious and deadly programs of terrorism against the Negro citizen' and that 'The action of the Governor of the State of California in issuing the warrant of extradition, and officers of the Sheriff's Department of Los Angeles, under said warrant, are contrary to the prohibitions of the Fourteenth Amendment to the Constitution of the United States, in that they are actions of the State in aid of

a violation of constitutional rights guaranteed to him, the petitioner, by the due process clause of the federal constitution.' "

The Court said with regard to the issues presented by the petition:

> "It is well settled that the scope of inquiry in such a proceeding is limited to a determination of the sufficiency of the papers and the identity of the prisoner."

The Court cited the recent case of *Johnson v. Matthews, supra,* in denying the petition for a writ.

2.

The demand of the Governor of Georgia, accompanied by all requisite authenticated documents for the extradition of appellee as a fugitive from justice from the State of Georgia, invoked into operation the provisions of Sections 1548.2, 1549.2, 1549.3 and 1553.2 of the Penal Code of California.

The congressional act regulating interstate extraditions has been supplemented by state legislation in aid of the Act of Congress. Fricke in "California Criminal Procedure" at page 33 states:

> "More than one-half of the United States have already adopted a uniform act to govern extradition proceedings and in those states, which include California, the statute law is now the same though the section numbers of the statutes may be different."

Fricke, *supra,* at page 32 lists the following states as having adopted the Uniform Extradition Act: Alabama, Arizona, Arkansas, California, Delaware, Idaho, Indiana,

Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Dakota, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming.

The validity of state legislation ancillary to and in aid of the Act of Congress regulating interstate extraditions is now well established.

In re Tenner (1942), 20 Cal. 2d 670;

In re Harris (1941), 309 Mass. 180, 34 N. E. 2d 504.

On the other hand, the enactment of legislation by a state which would impair the operation of Article IV, Section 2, Clause 2, of the Constitution of the United States and of the Act of Congress regulating interstate extraditions by requiring more evidence of guilt than required by the Act of Congress is unconstitutional.

In re Tenner (1942), 20 Cal. 2d 670, 677;

Kurtz v. State (1886), 22 Fla. 36;

1 *Am. State Reports* 173.

It has likewise been held that a state has no power to limit the right of a chief executive to grant warrants of extradition.

State ex rel. Brown v. Grosh (1941), 152 S. W. 2d 239, 245, 177 Tenn. 619.

It is clearly established that state laws cannot make any requirements further than those made by the Act of Congress although it has been well established also that the laws of the state on the subject of extradition may require the governor to surrender a fugitive on terms less

exacting than those imposed by the Act of Congress and also that the state may provide for cases not provided for by the United States. Supporting cases are:

State ex rel. Lea v. Brown (1933), 166 Tenn. 669, 64 S. W. 2d 841, 91 A. L. R. 1246 (writ of certiorari denied in 292 U. S. 638 (1934), 78 L. Ed. 1491);

In re Tenner, supra.

The Uniform Extradition Act in aid of the Act of Congress regulating interstate extraditions has been enacted by the State of California and has been in force and effect in the State of California since 1937, and some provisions thereof have been upheld as constitutional.

In re Morgan (1948), 86 Cal. App. 2d 217;

In re Davis (1945), 68 Cal. App. 2d 798;

Ex parte Morgan (1948), Dist. Ct. S. D., Cal. Central Div., 78 Fed. Supp. 756. Affirmed 1949 by the U. S. Court of Appeals of the Ninth Circuit Court, 175 F. 2d 404.

Section 1548.2 of the Penal Code of California, one of the provisions of the Uniform Extradition Act, provides for the form and prerequisite allegations of demand for the extradition of a fugitive from justice as follows:

"No demand for the extradition of a person charged with crime in another State shall be recognized by the Governor unless it is in writing alleging that the accused was present in the demanding State at the time of the commission of the alleged crime, and that thereafter he fled from that State. Such demand shall be accompanied by a copy of an indictment found or by information or by a copy of an affidavit made before a magistrate in the demanding

State together with a copy of any warrant which was issued thereon; or such demand shall be accompanied by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding State that the person claimed has escaped from confinement or has violated the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that State; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be certified as authentic by the executive authority making the demand."

Section 1549.2 of the Penal Code of California, another provision of the Uniform Extradition Act in force and effect in California, provides:

"If a demand conforms to the provisions of this chapter, the Governor shall sign a warrant of arrest, which shall be sealed with the State seal, and shall be directed to any peace officer or other person whom he may entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance."

Section 1549.3 of the Penal Code of California relates to the authority conferred by the Governor's warrant to arrest an accused, and reads as follows:

"Such warrant shall authorize the peace officer or other person to whom it is directed:

(a) To arrest the accused at any time and any place where he may be found within the State;

(b) To command the aid of all peace officers or other persons in the execution of the warrant; and

(c) To deliver the accused, subject to the provisions of this chapter, to the duly authorized agent of the demanding State."

Section 1553.2 of the Penal Code of California restricts the scope of inquiry by the Governor or California courts in extradition cases. The section reads:

"The guilt or innocence of the accused as to the crime with which he is charged may not be inquired into by the Governor or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided has been presented to the Governor, except as such inquiry may be involved in identifying the person held as the person charged with the crime."

Under authority of the statutes above quoted, the form and allegations of the demand of the Governor of Georgia accompanied by all requisite documents invoked into operation the above designated provisions and appellee was held in custody in conformity therewith.

3.

The scope of the inquiry in an application for habeas corpus in cases having an extradition base is limited to the following questions: (1) whether the person demanded has been subsantially charged with crime, and (2) whether he is fugitive from justice of the demanding state.

The petition for a writ filed by appellee raised no issue within the scope of inquiry applicable to rendition proceedings. Appellee's petition raises no issue of mistaken identity, that appellee is not charged with any crime in the demanding state; that he was not in the demanding

state at the time of the commission of the alleged crimes, nor that appellee was not a fugitive from the demanding state. The District Court in Finding of Fact No. 2 [R. pp. 82, 83] found that the appellee had been arrested and was being held in custody by the appellant Sheriff of Santa Barbara County, California, under and pursuant to a warrant of arrest issued by the Governor of Georgia, upon written requisition of the Governor of the State of Georgia, certified as authentic; that the requisition was accompanied with a copy of the indictment charging appellee with the commission of five counts of burglary, a copy of the judgments and conviction and sentence of appellee on each of five counts of burglary, each of which accompanying documents was certified as authentic.

The District Court in Finding of Fact No. 7 [R. p. 86] acknowledges that the appellee escaped from the Walton County Public Works Camp on or about July 19, 1939, and fled the State of Georgia.

The District Court, notwithstanding the above referred to findings, refused to accept or apply in this extradition proceeding the well established scope of inquiry applicable to extradition proceedings.

A leading case limiting the scope of inquiry is the case of *Biddinger v. Commissioner of the City of New York* (1917), 245 U. S. 128, 135. Justice Clark at page 135 said:

> "This much, however, the decisions of this court make clear: that the proceeding is a summary one, to be kept within narrow bounds, not less for the protection of the liberty of the citizen than in the public interest; that when the extradition papers required by the statute are in proper form the only evidence sanctioned by the court as admissible on such a hear-

ing is such as tends to prove that the accused was not in the demanding state at the time the crime is alleged to have been committed; and frequently and emphatically, that defenses cannot be entertained on such a hearing, but must be referred for investigation to the trial of the case in the courts of the demanding state."

In *Drew v. Thaw, supra,* the facts involved were substantially as follows: Thaw was held upon a warrant issued by the Governor of New Hampshire pursuant to an extradition demand from the Governor of New York. The indictment alleged that Thaw had been committed to a state hospital for the insane under an order reciting that he had been acquitted at his trial upon a former conviction on the grounds of insanity and that he had escaped from such state hospital. Justice Holmes at page 439 said:

"The most serious argument on behalf of Thaw is that if he was insane when he contrived his escape he could not be guilty of crime, while if he was not insane he was entitled to be discharged; and that his confinement and other facts scattered through the record require us to assume that he was insane. But this is not Thaw's trial. In extradition proceedings, even when as here a humane opportunity is afforded to test them upon habeas corpus, the purpose of the writ is not to substitute the judgment of another tribunal upon the facts or the law of the matter to be tried. The Constitution says nothing about habeas corpus in this connection, but peremptorily requires that upon proper demand the person charged shall be delivered up to be removed to the State having jurisdiction of the crime. Article 4, Sec. 2. Pettibone v. Nichols, 203 U. S. 192, 205. There is no discretion allowed, no inquiry into motives. Kentucky v. Den-

nison, 24 Howe 66; Pettibone v. Nichols, 203 U. S. 192, 203. The technical sufficiency of the indictment is not open. Munsey v. Clough, 196 U. S. 364, 373. And even if it be true that the argument stated offers a nice question, it is a question as to the law of New York which the New York courts must decide."

Other decisions of the Supreme Court of the United States supporting the proposition are:

Whitten v. Tomlinson (1895), 160 U. S. 231, 40 L. Ed. 406;

Hogan v. O'Neill (1921), 255 U. S. 52, 65 L. Ed. 497.

Recent decisions in extradition cases disclose that the focal point of limited inquiry in habeas corpus cases involving an extradition base remains sound law.

Johnson v. Matthews (May 1, 1950), *supra* (Opinion in Appendix);

In re Application of Eugene Backstron, for Writ of Habeas Corpus (July 19, 1950), *supra;*

Huff v. Ayers (Feb. 14, 1950), 6 N. J. Super. 380, 71 A. 2d 392.

In *Brewer v. Goff, Sheriff* (1943), 138 F. 2d 710, at page 712, the Court said:

"The only prerequisites to extradition from one state to another are, that the person sought to be extradited is substantially charged with a crime against the laws of the demanding state, and that he is a fugitive from justice . . . Admittedly, the extradition papers are in proper form, that is, he is substantially charged with having violated his

parole in California, and it is well established that a parole violation is an extraditable offense within the meaning of the statute."

The decision of Judge Yankwich in *Ex parte Morgan,* District Court S. D. California, Central Division (1948), 78 Fed. Supp. 756, at page 761, also confirms the narrow limits of the Federal Rendition Act; affirmed by the United States Court of Appeals for the Ninth Circuit in 175 F. 2d 404.

Decisions of the courts of California involving habeas corpus matters having an extradition base have conformed to the controlling principles as announced by the Supreme Court of the United States. In an early case arising in California, *In re Letcher* (1904), 145 Cal. 563, it was contended in an extradition matter that the indictment by an Ohio grand jury was rendered without any legal evidence having been submitted to the grand jury. The Supreme Court of California at page 564, said:

> "The indictment charges a public offense within the statute of the State of Ohio. The regularity of the proceedings had in that state before extradition is not reviewable by us in this proceeding."

In the case of *In re Murdock* (1936), 5 Cal. 2d 644, 648, the Supreme Court of California said at page 648:

> "Whether the petitioner is guilty of an offense under the laws of Montana or whether he has a good defense to the charge by reason of lapse of time or otherwise are questions for the courts of that state, rather than for the tribunals of this commonwealth. In interstate extradition proceedings it is not the purpose of the writ of habeas corpus to substitute the judgment of a tribunal of the state where the accused is apprehended upon the facts or the law of the mat-

> ters to be tried. (Drew v. Thaw, *supra.*) Nor is it proper to be governed by speculation as to what ought to be the result of the trial in the demanding state."

Other cases supporting the principle of the limited inquiry are:

> *In re Brown* (1929), 102 Cal. App. 97;
>
> *In re Frank F. Harper* (1936), 17 Cal. App. 2d 446.

In the case of *In re Davis* (1945), 68 Cal. App. 2d 798, the Court upheld extradition demands by Iowa, and said at page 810:

> "The statute of limitations as a defense must be asserted in the trial of the offense with which the petitioner is charged."

This basic principle of limited inquiry in habeas corpus cases having an extradition base has been written into the Uniform Extradition Act and is applicable to the Governor and the courts of California.

Section 1553.2 of the Penal Code of the State of California reads:

> "The guilt or innocence of the accused as to the crime with which he is charged may not be inquired into by the Governor or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided has been presented to the Governor, except as such inquiry may be involved in identifying the person held as the person charged with the crime."

The District Court fails in its opinion to consider or mention any of the landmark decisions of the United

States Supreme Court establishing the scope of extradition inquiry and the issues which are presented by it.

The District Court commits the fallacy of shifting grounds to a question not in issue in the case, that is, with respect to the scope of inquiry applicable to habeas corpus proceedings involving non-rendition cases. The District Court [R. p. 54] in effect projects the sphere of inquiry applicable in non-rendition cases to rendition cases in lieu of the well established and limited scope of inquiry rule. Cases are cited by the Court [R. p. 54] in support of the position taken that the Court was required to inquire into the issues presented by appellee's petition.

Johnson v. Zerbst (1938), 304 U. S. 458, 82 L. Ed. 1461, cited by the Court, is not an extradition case, but involved a federal prisoner who in his trial was denied certain rights under the Sixth Amendment to have assistance of counsel for his defense.

Waley v. Johnston (1942), 316 U. S. 101, 86 L. Ed. 1302, cited by petitioner, does not involve an extradition case, but that of a federal prisoner who was convicted on a plea of guilty coerced by certain federal law enforcement officers. Nothing is said in the case remotely indicating that in rendition cases such inquiry would be warranted.

Mooney v. Holohan (1935), 294 U. S. 103, does not sustain the argument advanced as to the wide scope of habeas corpus in rendition cases.

Neither were the cases of *Moore v. Dempsey* (1923), 261 U. S. 86, 67 L. Ed. 543, and *Frank v. Magnum* (1915), 237 U. S. 309, extradition cases, and no comment is made in those cases that at a rendition stage the scope of inquiry is broad enough to include inquiry such as sought in the instant case.

(1) Applicant Seeking to Defear Extradition Is Not Entitled to Release on Habeas Corpus on Ground That He Has Been Denied Assistance of Counsel in the Demanding State.

In the case of *Ex parte Colier*, decided by the Court of Errors and Appeals of New Jersey (1947), 55 A. 2d 29, the Court considered this same issue. The case involved an extradition proceeding instituted for the return of the petitioner to the State of South Carolina. He had been tried and convicted, and while serving sentence upon several convictions of crime he escaped in 1938. At page 30 the Court said:

> "The petitioner does not deny his identity or the fact that he is a fugitive from justice. He objects to his return to South Carolina upon the ground that he 'was tried on a criminal indictment for larceny and house-breaking without the assistance of counsel, and without intentionally and intelligently waiving his civil and constitutional right to the assistance of counsel.' The petitioner never applied to the South Carolina courts to have his claim now made that he was deprived of his constitutional right to counsel on the trial of the indictments passed upon. The right to do so is still open to him, and in the event such application to the courts of that state if his efforts should prove fruitless, he still has open to him the right to apply to the United States Supreme Court for its protection of his constitutional right."

The Court continues:

> "It is the law that the asylum state of a person fleeing the state of his conviction for crime has no right to consider the merits of his trial, but only the question as to the obligation of the asylum state to surrender the person to the state from which he fled.

> The question of guilt or innocence, or whether there was a violation of petitioner's constitutional right on the trial of the indictments preferred against him in South Carolina, cannot be determined by this Court. They are to be determined by the courts of the state in which he was tried, and, if denied what he conceives to be his constitutional right, he may apply to the United States Supreme Court for the protection of such right. (Citing cases.) The order to show cause is discharged and the application for the writ of habeas corpus denied."

The Supreme Court of the United States on February 2, 1948, denied a petition for a writ of certiorari in this case. (333 U. S. 828, 829.)

Other supporting decisions that such issue is beyond the scope of inquiry at the rendition stage are: *In re Backstron, supra; Johnson v. Matthews, supra.*

The District Court in the instant case, on the other hand, held that the failure to afford counsel for the appellee constituted a denial of due process by the State of Georgia. [See Court's opinion, R. p. 57.]

The case of *Uveges v. Commonwealth of Pennsylvania* (1948), 335 U. S. 437, 93 L. Ed. 152, cited by the District Court in support of its conclusion, is not an extradition case. The decision was rendered on writ of certiorari to the Supreme Court of the Commonwealth of Pennsylvania after the exhaustion of remedies in the state courts where the petitioner had been convicted. Similarly, the case of *Wade v. Mayo,* 334 U. S. 672, 92 L. Ed. 1647, cited by the Court, did not involve an extradition case.

The factual situation there involved the refusal of a court in Florida to appoint counsel for him. He exhausted the remedies of the offending state and then resorted to the Federal courts for relief.

The case of *Gibbs v. C. J. Burke* (June 27, 1949), 93 L. Ed. (Advance Opinions) 1343, cited by the Court in support of its conclusion, was not an extradition case, and, among other things, held that the due process clause does not guarantee to every person charged with a serious crime in a state court the right to the assistance of counsel, regardless of circumstances. Exhaustion of remedies was shown in that case in the state courts of the state where the alleged deprivation of counsel occurred.

(2) The Alleged Violation of Constitutional Rights in Connection With Commitment and Conviction of Middlebrooks for the Burglary Offenses Presents No Litigable Issue at the Present Rendition Stage.

State ex rel. Lea et al. v. Brown et al., decided by the Supreme Court of Tennessee (1933), 64 S. W. 2d 841. This case involved an extradition proceeding in Tennessee arising out of a demand by the Governor of North Carolina for the return of petitioners as fugitives from justice from that State. The petitioners contended that they had been denied due process of law by the courts of North Carolina, as a defense to the extradition proceeding. The Court, at page 844, said:

> "In our opinion, the only questions open for consideration in this proceeding are whether the relators are charged with crime in North Carolina and are fugitives from the justice of that state. These were

the only questions proper for the Governor to consider in determining whether he should issue his warrant on the demand of the Governor of North Carolina."

Continuing, the Court said at page 844:

"If the procedure followed by the state of North Carolina in the trial and conviction of the relators violated any of their constitutional rights, and if there has been no conclusive adverse adjudication of those points, it would nevertheless be our duty, under the Constitution of the United States, to presume that such wrongs will be remedied when and if the relators are restored to the jurisdiction of North Carolina and steps are there taken to enforce the judgment of its courts. We repeat, this proceeding in Tennessee is not a proceeding to enforce the judgment of the North Carolina courts, but is purely incidental thereto, and the only inquiry open here is whether the Governor of Tennessee rightfully concluded that relators, being charged with crime in North Carolina, have fled to Tennessee from the justice of that state."

The Court further said at page 845:

"These views follow necessarily from the nature of the proceeding, an application for the writ of habeas corpus to test the validity of the Governor's warrant by the Constitution and statute of the United States, pursuant to which it was issued. Being without jurisdiction to enforce the judgment of North Carolina, the courts of Tennessee are without jurisdiction to inquire into the validity of such judgment as a basis for granting or denying extradition. And, if the relators have been denied due process of law by the courts of North Carolina, with respect to matters not already adjudicated, they should be left free to present such

matters to a state or federal court to which the state of North Carolina is subject, whenever that state, having regained custody of them, endeavors to enforce its judgment. The relators will remain under the protection of the Federal Constitution, if returned to North Carolina, and this proceeding for the writ of habeas corpus is a summary proceeding, 'to be kept within narrow bounds, not less for the protection of the liberty of the citizen than in the public interest.' Biddinger v. Commissioner of Police, 245 U. S. 128, 38 S. Ct. 41, 43, 62 L. Ed. 193.

"This limitation of the scope of our jurisdiction in this proceeding is clearly indicated by the rulings of the Supreme Court. Munsey v. Clough, 196 U. S. 364, 25 S. Ct. 282, 284, 49 L. Ed. 515; Drew v. Thaw, 235 U. S. 432, 35 S. Ct. 137, 59 L. Ed. 302; Hogan v. O'Neill, 255 U. S. 52, 41 S. Ct. 222, 65 L. Ed. 497."

The Supreme Court of the United States denied a writ of certiorari in this case (1934), 292 U. S. 638, 639; 78 L. Ed. 1491.

In the case of *Powell v. Meyer* (1945), 43 A. 2d 175, there was involved an extradition demand by the State of Georgia for the return of petitioner from the State of New Jersey. The petitioner contended on habeas corpus proceeding to defeat the extradition that he had been denied equal protection of the law and due process of law, in the Negro citizens were systematically excluded from the grand and petit juries by which he, a Negro, was indicted, tried and convicted of the offense of murder. He contended that because of popular feeling against him he did not have a fair trial and that he feared mob violence if re-

turned. Petitioner had escaped from confinement and went to New Jersey, where he lived until his arrest on an extradition warrant. The Court at page 177 said:

> ". . . It has long been settled that, on extradition the asylum state has no right to consider the merits—the prisoner's guilt or innocence—but only the question of whether the prisoner is within the extradition clause itself, *i.e.*, his identity with the fugitive charged, and the fact that the charge is one of actual crime. . . .
>
> "Often the courts, out of sympathy for the prisoner, are wont to scrutinize extradition proceedings rather closely. But in these cases it seems to be overlooked that the prisoner's rights and persons can be fully protected, while at the same time the state's constitutional obligations, as above, can be fully performed. Here, specifically, Powell's rights can be fully protected, even on his return to Georgia, by application there to either or both the state and, if necessary, the Federal, courts in Georgia.
>
> "On the other hand, Powell has never yet presented to the Georgia courts the grounds of objection he now urges. How can he, in justice, charge Georgia with injustice, unheard? And even should his application to the state courts of Georgia prove fruitless, he is amply protected by his then clear right to apply to the United States Supreme Court for its protection of his constitutional rights."

The Supreme Court of New Jersey on April 22, 1946, affirmed the decision of the lower court at 46 Atlantic Reporter 2d 671. The Supreme Court of New Jersey at pages 671-672 said:

> "The question of guilt or innocence, or whether there was a violation of prosecutor's constitutional

rights in the proceedings in the courts of Georgia, cannot be determined by the courts of this state. They are to be determined by the courts of the state in which he was tried, and, if denied what he conceives to be his constitutional rights, he may apply to the United States Supreme Court for the protection of such rights.

"We conclude that this court is without jurisdiction to deal with the alleged denial of prosecutor's constitutional rights by the courts of Georgia, on return of a writ of habeas corpus, and that the rule to show cause must be discharged and a writ of certiorari to review the action of the Essex County Court of Common Pleas denied."

The following cases and authorities support the proposition of limited inquiry in extradition cases:

In *Ex parte Quilliam, Ex parte Woodall* (June 13, 1949), decided by a Court of Appeals of Ohio, 89 N. E. 2d 493, the Court said:

"It is the view of this Court that the question here presented is one which seeks to invoke the jurisdiction of this Court to pass upon a question which it is beyond the power of this Court to consider, that is, whether or not a sister State is violating the Constitutional rights of one charged and convicted of crime by its courts.

"If the constitutional rights of a prisoner are being violated in the sister State, such question should be presented by proper proceedings to the courts of that State for remedy. The only remedy that would be available by granting the writs here requested would be to release the prisoners in the State of Ohio, thus in effect commuting their sentences for serious crimes of which they have been found guilty."

The Supreme Court of Ohio dismissed appeal (1949), 152 Ohio St. 368, 89 N. E. 2d 494.

In *Ex parte Paramore* (1924), 123 Atl. 246, affirmed in 125 Atl. 926, the petitioner raised the issue in an extradition case that he feared mistreatment or lynching if returned to the demanding state. Petition denied.

In *Blevins v. Snyder,* U. S. Marshal (1927), decided by Circuit Court of Appeals of the District of Columbia, 22 F. 2d 876, the issue was raised that the petitioner could not get a fair trial if returned to the demanding state. Writ denied.

In *Pelley v. Colpoys,* U. S. Marshal (1941), 122 F. 2d 12, the petitioner raised the issue that the proceedings for his extradition originated out of a judge's personal animosity. Petition for a writ denied. Certiorari denied (1941) 86 L. Ed. 499.

In *Ex parte Ray* (1921), decided by Supreme Court of Michigan, 183 N. W. 774, 776. The petitioner in an extradition matter raised the issue that he would not have a fair trial in the demanding state if returned. Held not in issue in an extradition proceeding.

In *U. S. ex rel. Faris v. McClain,* Warden (1942), 42 Fed. Supp. 429, the petitioner alleged that he was not a fugitive from justice, but from injustice; that the injustice consisted of certain prison conditions, chaining at night, unsuitable food and methods of punishment. Petition denied.

In *Hale v. Crawford* (1933), the Circuit Court of Appeals, First Circuit, 65 F. 2d 739, held that alleged exclusion of Negroes from grand jury was not an issue in interstate extradition proceedings. Petition for certiorari refused. 78 L. Ed. 581 (1933).

(3) Alleged Cruel Treatment Is Beyond the Scope of Inquiry in an Extradition Case.

The Court in its opinion [R. pp. 62 to 66, incl.] held that the punishment inflicted on petitioner by the State of Georgia, through its chain gang, constituted cruel and unusual punishment and was a violation of the due process clause of the Fourteenth Amendment. The Court cited the decision of the U. S. Court of Appeals for the Third Circuit in *Johnson v. Dye* (1949), 175 F. 2d 250, 255, in support of its conclusion.

The decision of Judge Biggs in *Johnson v. Dye, supra,* was based upon the following premise: The Court said at page 256:

> "The doctrine of exhaustion of state remedies in habeas corpus cases does not apply to extradition."

This case was, however, reversed by the Supreme Court of the United States on November 7, 1949, 70 S. Ct. 146, 94 L. Ed. (Adv. Ops.) 67. The Court said in reversing the case:

> "The petition for writ of certiorari is granted and the judgment is reversed. Ex parte Hawk, 321 U. S. 114, 64 S. Ct. 448, 88 Law Ed. 572."

A rehearing by the United States Supreme Court was refused. (December 5, 1949, 94 L. Ed. 149, 70 S. Ct. 238, 338 U. S. 896.)

The District Court in its opinion [R. p. 65] took the position that *Johnson v. Dye, supra,* having been reversed on procedural grounds, there is an inference that the Supreme Court was not disturbing those portions of the opinion dealing with cruel and unusual punishment and the scope of the constitutional protection under the Fourteenth

Amendment. We see no merit to this contention. To project such an inference into a conclusion that the numerous decisions of the Supreme Court limiting the scope of inquiry in rendition cases are no longer sound law is a *non sequitur* fallacy. The Supreme Court passed on the issue before it and the Court would have been prejudging the issue of cruel and unusual punishment by commenting on a phase of the case which was not properly before it, in view of the non-exhaustion of remedies. *Johnson v. Dye* has been reversed and cannot, in view of its reversal, constitute authority as against the avalanche of decisions for generations upholding the limited scope of inquiry on the basis of the Federal Rendition Act.

The United States Court of Appeals for the District of Columbia in footnote No. 22 to its decision in *Johnson v. Matthews* (182 F. 2d 677, 682, 683) interprets the reversal of *Johnson v. Dye, supra,* by the Supreme Court as follows:

> "175 F. 2d 250 (1949). That case was reversed by the Supreme Court (338 U. S. 864 (1949)) without opinion and without dissent, upon a single reference, 'Ex parte Hawk, 321 U. S. 114.' Ex parte Hawk contained no reference to extradition. It concerned procedure in habeas corpus in the federal court having jurisdiction in the state where the petitioner was indicted, convicted, sentenced and incarcerated. The petitioner there was thus confined in the Nebraska State Penitentiary under sentence for murder imposed by a Nebraska District Court. The habeas corpus was sought in the United States District Court for Nebraska. The Supreme Court held that he must exhaust his remedies in the courts of

Nebraska. Applying the doctrine of that case to Johnson v. Dye—and to the case at bar—the petitioner would be required to exhaust his remedies in the courts of Georgia before resorting to the federal courts. If the Supreme Court, in Johnson v. Dye, meant that the petitioner must exhaust his remedies in the Pennsylvania courts (where he was being held for extradition only), it meant that those courts had jurisdiction to entertain, and so to grant, his petition upon the grounds he alleged. That would have been a revolutionary reversal of all the cases ever written upon the subject, and we have serious doubt that the Court intended to accomplish that result without argument and without opinion. Rather it seems more reasonable that the Court meant, by citing Ex parte Hawk, to tell the petitioner to apply first to the state courts of Georgia which had jurisdiction over the executive officials against whom he was complaining."

The decision of the United States Supreme Court in *Louisiana ex rel. Francis v. Resweber* (1947), 329 U. S. 459, 67 S. Ct. 374, 91 L. Ed. 422, is not authority for the District Court's position that cruel and unusual punishment is a litigable issue in a rendition case. On the other hand, the case contains authority for the proposition that a prisoner need not be released although his punishment is cruel and unusual. In this case the petitioner contended that he was to be punished in a cruel and unusual manner by being placed in the electric chair for the second time, after an electrical failure at the time set for the initial electrocution. The majority of the

Court came to the conclusion that the punishment was not cruel or unusual. Justice Burton, speaking for the minority group of judges, said at page 480:

> "The remand of this case to the Supreme Court of Louisiana in the manner indicated would not mean that the relator necessarily is entitled to a complete release. It would mean merely that the courts of Louisiana must examine the facts both as to the actual nature of the punishment already inflicted and that proposed to be inflicted and, if the proposed punishment amounts to a violation of due process of law under the Constitution of the United States, then the State must find some means of disposing of this case that will not violate that Constitution."

Stanford Law Review (December, 1949), Volume 2, Number 1, pages 174, 178, states, in commenting on this decision:

> "Here then were four justices of the Supreme Court who would hold that a prisoner need not be released although his punishment is cruel and unusual. The other five justices voiced no opinion on this question.
>
> "The proper remedy, therefore, for cruel and unusual punishment is to remand the prisoner to the prison officials to be dealt with in a manner authorized by the Constitution. A convict validly held for a crime against the state would not be thrust upon society; and yet the court could give him some assurance that he would not be mistreated in the future."

The same Law Review article, in commenting upon the decision of *Johnson v. Dye, supra,* said at page 183:

> "The court went beyond its jurisdiction in considering the treatment accorded Johnson on the chain gang. At most it should have asked three questions: was Johnson validly charged with a crime in Georgia; was he a fugitive from its justice; and was there danger of mob violence in case he was returned? Had the Court stopped there, Johnson would have been returned to Georgia where he could avail himself of any of the possible remedies we have discussed."

Harper v. Wall, 85 Fed. Supp. 783 (D. N. J. 1949), and *Ex parte Marshall,* 85 Fed. Supp. 771 (D. N. J. 1949) should not be regarded as authoritative cases on the admissibility of evidence involving alleged cruel and unusual treatment for the reason that such cases were based upon the decision of the United States Court of Appeals, Third Circuit, in *Johnson v. Dye, supra,* which, as we have pointed out, was reversed by the Supreme Court of the United States.

Weems v. United States, 217 U. S. 349, 30 Sup. Ct. 544 (1910), involved a factual situation wherein there was exhaustion of the remedies of the Philippine territorial courts before the Supreme Court on appeal passed upon issues with regard to alleged cruel and unusual punishment.

Justice O'Connell in a dissenting opinion in *Johnson v. Dye, supra,* made a distinction between past punishment

involving cruel and unusual punishment and a prospective violation involving such punishment. He expressed great doubt whether past infringements of punishment involving constitutional rights would of itself entitle Johnson to release and favored remanding of the case to determine whether Johnson would reasonably likely be required to undergo similar abuse if he were returned to the demanding state.

Circuit Judge Bazelon in a dissenting opinion in *Johnson v. Matthews, supra* (Opinion in the Appendix), also was in agreement with the views of Justice O'Connell and favored a remanding of the case for a determination whether it was reasonably likely he would undergo similar abuse if returned to the demanding state.

The record in the instant case is barren of any evidence of penal practices or conditions in Georgia prisons as of the date of the trial on December 20, 1949.

Sylvester Middlebrooks' testimony regarding alleged mistreatment and conditions in Georgia prisons covers a period prior to July 13, 1939, when he escaped and fled the State of Georgia.

Similarly, the testimony of Horace B. Conkle regarding conditions in a Georgia prison concerned conditions prior to July of 1939 [R. p. 190]. The above named witness did testify [R. p. 191] that he made a visit to Georgia in the year 1945 or 1946 and observed chain gangs at work, but that he did not observe any brutality on that trip [R. p. 192]. We do not regard as competent evidence

the excerpt of a reprint of the President's Committee on Civil Rights as it appeared in the San Francisco News and which refers to the alleged killing of eight Negro prisoners on July 11, 1947 as they allegedly attempted to escape [R. pp. 201, 203].

Notwithstanding the absence of evidence in respect to present conditions of Georgia prisons, the District Court makes a finding of fact, identified as No. 8 [R. p. 86], that appellee would be subjected to the penal methods and practices set forth in finding of fact No. 5 [R. pp. 84, 85], which refers to conditions and penal practices as of the time of the appellee's original commitment.

Also in conclusion of law No. 11 [R. p. 91] the District Court made a determination that the appellee would again be subjected to cruel and unusual punishment if he were returned to the State of Georgia. Such conclusion of law is not supported by any evidence.

Other cases in opposition to the conclusion of the Court that alleged cruel treatment is within the scope of inquiry in extradition cases are:

Johnson v. Matthews, supra;

In re Backstron, supra;

People ex rel. Jackson v. Ruthazer, 196 Misc. 34, 90 N. Y. S. 2d 205 (1949).

Volume 23, Southern California Law Review, July, 1950, No. 4, page 441, expresses views in opposition to those expressed herein.

4.

The failure of the Court to test the asylum state's arrest and detention for extradition purposes within the established rule of extradition inquiry nullified the provisions of Article IV, Section 2, Clause 2, of the Constitution of the United States, and the Act of Congress regulating interstate extraditions. (18 U. S. C. 3182.)

Conclusion of Law No. 14 [R. p. 92] states:

> "The conclusions of law contained in the opinion of the court filed February 3, 1950, are by this reference incorporated in these Findings of Fact as fully as if set forth in *haec verba*."

The District Court in Part V of its opinion [R. pp. 69, 70) presents the following conclusions of law. The District Court states:

> "Neither the Uniform Extradition Act of the State of California, Nor Article IV, Section 2, Clause 2 of the Constitution of the United States Nor the Act of Congress, Regulating Interstate Extraditions, Prevail Over the Fourteenth Amendment.
>
> "The proposed rendition of the prisoner by California is pursuant to the compact to effect rendition of persons 'charged in any State with Treason, Felony or other crime,' contained in Art IV, Section 2, Clause 2 of the U. S. Constitution. But Art. IV does not require rendition which violates the Fourteenth Amendment of the same Constitution. This disposes of the respondent's contention that to grant the release of petitioner under this writ, the court must hold unconstitutional the Uniform Extradition Act of the State of California.

"Statutes constitutional on their face may not be used for unconstitutional purposes or with unconstitutional results.

"See Yick Wo v. Hopkins, 118 U. S. 356; 373-374, 30 L. Ed. 220 (1886).

"As we have stated herein action by a State in arresting and holding a prisoner for extradition, may be ostensibly lawful and then by the revelation and judicial finding of certain facts thereafter, may be determined to be unlawful custody, violative of the due process clause of the Fourteenth Amendment."

The *Yick Wo v. Hopkins* case, *supra,* cited by the District Court in support of its conclusion involved the following factual situation: A county ordinance was enacted to regulate public laundries in the City and County of San Francisco. The ordinance prohibited the engaging in the laundry business without first having obtained the consent of the Board of Supervisors. The evidence introduced in the case showed that the Board of Supervisors withheld their consent to establish laundries to subjects of China who were residing in the United States, but who were not citizens of the United States. On the other hand, Chinese people who were citizens of the United States were readily granted licenses. The unequal and unjust discrimination in the administration of the ordinance was, therefore, an issue in the case. The Court said at page 373:

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and

> illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

The issue in the *Wo* case, therefore, involved a regulatory ordinance which was administered discriminatorily in favor of citizens and against aliens.

It is clear that the case presents no practical analogy with the issues involved in the instant case. There assuredly is no issue of discrimination in the administering of Article IV, Section 2, Clause 2, of the Constitution of the United States, or the Act of Congress regulating interstate extraditions.

In the case of *Bird v. U. S.,* 187 U. S. 118, 124, 47 L. Ed. 100, 103 (1902), the Supreme Court said:

> "There is a presumption against the construction which would render a statute ineffective or inefficient or which would cause great public injury or even inconvenience."

In *U. S. v. Neal Powers et al.,* 307 U. S. 214, 83 L. Ed. 1245 (1939), the Supreme Court approved the above quoted language of the *Bird* case, *supra,* and applied the doctrine.

In *Yankee Net Work v. Federal Communications Commission,* 107 Fed. Rep. 2d 212, 219 (1939), and in the case of *Buxbom v. City of Riverside,* 29 Fed. Supp. 3 (1939), the courts rejected analogies based on *Yick Wo v. Hopkins, supra,* case and applied the presumption referred to in the *Bird* case, *supra.*

The nullification of the constitutional provision and congressional enactment pertaining to interstate extraditions on the basis of the District Court's analogy from the *Yick Wo v. Hopkins, supra,* case is unwarranted.

Circuit Judge Prettyman in *Johnson v. Matthews*, 182 F. 2d 677, 682, rejected any inference of conflict between the extradition clause and the due process clause in the following language:

> "It is said that this case presents a conflict between provisions of the Constitution. It presents no such conflict. The extradition clause is a procedural provision. It does not impinge upon any substantive right of any individual and does not affect any provision of the Constitution or its Amendments protecting such rights. The provision of the Constitution which provides that trial for a crime committed in Georgia shall be in Georgia does not impinge upon any constitutional right of criminal defendants in Georgia. . . ."

Another compelling reason for rejection of an inference of conflict is well expressed by the Court at page 684, as follows:

> "The chaos into which the enforcement of criminal law would be plunged by the doctrine urged upon us by appellant is as readily discernible now as it was when the Colonies first made what is now the existing agreement. The case before us concerns Georgia. The next might concern Alabama. The question there might be whether casually attended, ununiformed laborers with chains attached to their legs, at work in the open air on country roads, are undergoing cruel and unusual punishment. The next case might concern New York or Illinois, and the question might be whether serried, shaved and numbered robots in the monotony of gray walls, or in occasional solitary confinement in darkened cells on bread and water, are suffering cruel and unusual punishment. And so a pattern of opinion in this jurisdiction concerning the penal practices of all the forty-eight states would in time necessarily develop."

5.

The failure of the Court to test the asylum state's arrest and detention for extradition purposes within the established rule of extradition inquiry nullified the provisions of Sections 1548.2, 1549.2, 1549.3 and 1553.2 of the Penal Code of the State of California.

We have heretofore pointed out that these sections of the Penal Code of California are provisions of a Uniform Extradition Act which are in force and effect in 31 states of the Union.

The Court in his Conclusions of Law [see Part V of the Court's opinion R. pp. 69, 70, heretofore quoted in the preceding section of this brief] determined that the Uniform Extradition Act was operative against appellee for unconstitutional purposes and with unconstitutional results and in violation of the due process clause of the Constitution of the United States.

We adopt the argument advanced in the preceding section of this brief with regard to this issue and urge that such procedural provisions of the Penal Code of California do not impinge upon any substantive rights of the appellee.

The form and requisite allegations of demand accompanied by all necessary authenticated documents invoked into operation the provisions of Section 1548.2 of the Penal Code of California and the Governor of California was required to honor the requisition demand of the Governor of Georgia for the arrest of appellee as a fugitive. Neither the Governor of California nor the courts of California under the provisions of Section 1553.2 could make inquiry of such matters as requested in the petition filed by appellee. All of the above referred to sections of the Penal Code are quoted in full in the Appendix to this brief at pages 2 and 3.

SECOND SPECIFICATION OF ERROR RELIED ON.

II.

The District Court Erred in Its Findings of Fact and Conclusions of Law in Determining That Appellee-Petitioner for a Writ of Habeas Corpus Based Upon Alleged Deprivations of Constitutional Rights in the Demanding State Need Not Have Exhausted the Remedies of the Demanding State.

The appellee's petition for a writ of habeas corpus fails to allege the exhaustion of any remedies of the State of Georgia, the demanding state, nor was there attempted to be shown during the trial the exhaustion of such remedies or that there was an absence of corrective process in that state. The trial court, on the other hand, made a determination that the appellee need not have exhausted his remedies in the State of Georgia. (See Part VII of the opinion of the Court filed February 3, 1950 [R. pp. 71-77] and incorporated as a conclusion of law of the Court by Section 14 [R. p. 92] of the Court's conclusions of law as if set forth *haec verba.*)

The District Court erred in holding that the appellee need not have exhausted the remedies of the State of Georgia.

The District Court further erred in this connection in finding that there were extraordinary circumstances existing sufficient to justify federal inquiry into the merits without the exhaustion of remedies of the State of Georgia. Hence, also on this specific ground the Court erred in overruling appellant's motion to dismiss the writ on the

ground that the petition for a writ did not state facts sufficient to constitute a cause of action, overruling appellant's objections to the introduction of testimony and evidence on behalf of appellee, and overruling appellant's motion to strike such testimony and evidence.

Argument to Second Specification of Error.

The petition for a writ in this case neither alleged the exhaustion of remedies of the Georgia courts nor alleged an absence of corrective process; nor at the trial of the proceedings was there any attempt to show either exhaustion of remedies of the Georgia courts or that corrective process in those courts was unavailable.

Neither the Court's findings nor conclusions of law make reference to this vital issue. However, the District Court by conclusions of law No. 14 [R. p. 92] incorporates conclusions of law contained in the opinion of the Court filed February 3, 1950, as if set forth *haec verba.*

Part VII of the Court's opinion [R. pp. 71-77, incl.] presents the District Court's conclusions on this subject.

The District Court held at R. p. 72 that "As a practical matter, it is extremely remote that any of the relief would be granted him by the Georgia courts," referring to the relief granted by the District Court on the three principal grounds relied on by the appellee in his petition.

Again, at R. p. 74, the District Court said:

> "A requirement that the petitioner exhaust in Georgia his remedy (referring to the issue of cruel

and unusual punishment), this particular point would be obviously an idle act, since the court can assume that Georgia chain gangs are operated under and pursuant to Georgia law."

The answer to this conclusion is that it is not to be presumed that

> "the decision of the state court would be otherwise than is required by the fundamental law of the land, or that it would disregard the settled principles of constitutional law announced by this court."
>
> *Ex parte Royall* (1886), 117 U. S. 241, 29 L. Ed. 868, 6 S. Ct. 734;
>
> *Darr v. Burford* (April 3, 1950), 94 L. Ed. Advance Opinions 511, 516.

The record is barren of any showing or evidence in the instant case whatsoever, remotely indicating that the remedies of the Georgia courts or federal courts having territorial jurisdiction over the State of Georgia are seriously inadequate or that corrective process would be unavailable to appellee on the grounds set forth in appellee's petition for a writ. The District Court's comments, above quoted, impugning the integrity of the Georgia courts is wholly unwarranted, and does not create "extraordinary circumstances" or circumstances of a peculiar urgency justifying any departure from the comity principle requiring exhaustion of remedies of the Georgia courts.

The District Court's granting of relief to appellee at the extradition stage, notwithstanding the requirements of the comity rule, is best explained by the Court's conclusions and, in fact, criticism of the rule. The Court at R. p. 75 expresses his conclusions on the subject as follows:

> "A further result has grown up in the cases which is apparent to anyone making a study thereof; the rule of the exhaustion of remedies in the State has been supplemented by the further rule that once the remedies have been exhausted and the highest court of the State has passed upon the problem, then Federal courts are reluctant to intervene because of comity and out of respect for State courts. Thus, there has been created an endless circle, which if followed to its logical conclusion would deny to a Federal District court the right to give relief for violations of basic constitutional rights."

We respectfully request the Court to consider the District Court's criticism of the comity rule in the light of the most recent statements of the Supreme Court of the United States on the origin of the comity doctrine, its purposes and historical development, as set forth in the case of *Pete Darr v. C. P. Burford, supra,* and the opinion of Justice Reed in *Wade v. Mayo,* 334 U. S. 672, 691.

Another answer to the Court's conclusions of law that there was no requirement for exhaustion of remedies of the Georgia courts in the *per curiam* reversal of the case of *Johnson v. Dye* by the Supreme Court of the United

States on November 7, 1949, 70 Supreme Court 146, 94 L. Ed. 67, 338 U. S. 864, in the following language:

> "The petition for writ of certiorari is granted and the judgment is reversed. Ex parte Hawk, 321 U. S. 114, 64 Supreme Court 448, 88 Law Ed. 572."

A rehearing was denied on December 5, 1949, 338 U. S. 896; 94 L. Ed. 149, 70 Supreme Court 238.

Section 2254 of 28 U. S. C., as recodified, now reads:

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

The Supreme Court of the United States in *Darr v. Burford, supra,* interprets the enactment as being declaratory of existing law as stated by the Court in *Ex parte Hawk, supra.*

The reversal of *Johnson v. Dye, supra,* by the Supreme Court on authority of *Ex parte Hawk* is authority for the proposition that appellee should have exhausted the rem-

edies of the Georgia courts before relief can be granted on habeas corpus at the extradition stage.

At R. p. 76 the Court concludes that violations of constitutional rights such as raised by appellee in his petition constituted exceptional circumstances coming within an exception to the comity doctrine.

The Court said at R. p. 76:

> "The general rule rests upon the balance between the State and Federal powers and jurisdictions, and the niceties of the comities existing between these several sovereignties. The observance of these niceties and the concern concerning comity must give way on the assertion and the finding of the violation of basic constitutional rights."

Again, the answer to the District Court's conclusion is the *per curiam* reversal of *Johnson v. Dye* (which involved the identical issue of alleged deprivations of constitutional rights). The Supreme Court did not construe alleged deprivations of constitutional rights, involving cruel and unusual punishment, as constituting exceptional circumstances or circumstances of a peculiar urgency which would render the rule inapplicable.

We respectfully contend that the Court erred in this conclusion of law, that the appellee need not have exhausted the remedies of the demanding state, and also erred in finding that there were extraordinary circumstances, either pleaded or shown, which have justified inquiry into the merits at the rendition stage without first requiring the exhaustion of remedies of the Georgia courts.

THIRD SPECIFICATION OF ERROR RELIED ON.

III.

The District Court Erred in Its Conclusions of Law That It Was Not Necessary for Appellee-Petitioner to Apply for a Writ of Certiorari to the Supreme Court of the United States After Denial of a Writ of Habeas Corpus by the Supreme Court of California.

The District Court in the instant case in finding of fact No. 9 [R. pp. 86, 87] and conclusion of law No. 1 [R. pp. 88, 89] concluded that appellee had exhausted all remedies available to him in the courts of the State of California, notwithstanding the failure to file a petition for a writ of certiorari to the United States Supreme Court.

The District Court likewise erred in said designated finding of fact and conclusion of law in finding the existence of any exceptional circumstances in the case which would have rendered it unnecessary for the appellee to file a petition for certiorari to the United States Supreme Court from the denial of relief on habeas corpus by the Supreme Court of the State of California.

Argument to Third Specification of Error.

The Supreme Court in the late case of *Darr v. Burford, supra,* overruled, so far as inconsistent, *Wade v. Mayo,* 334 U. S. 672, 92 L. Ed. 1647, and held that, in the absence of special circumstances as to which the petitioner has the burden of proof, certiorari to the United States Supreme Court from a State judgment denying collateral relief is a prerequisite to resort to a federal district court,

irrespective of whether or not denial of certiorari imports an opinion on the merits. At page 522 the Court said:

> "The sole issue is whether comity calls for review here before a lower federal court may be asked to intervene in state matters. We answer in the affirmative. Such a rule accords with our form of government. Since the states have the major responsibility for the maintenance of law and order within their borders, the dignity and importance of their role as guardians of the administration of criminal justice merits review of their acts by this Court before a prisoner, as a matter of routine, may seek release from state process in the district courts of the United States. It is this Court's conviction that orderly federal procedure under our dual system of government demands that the state's highest courts should ordinarily be subject to reversal only by this Court and that a state's system for the administration of justice should be condemned as constitutionally inadequate only by this Court. From this conviction springs the requirement of prior application to this Court to avoid unseemly interference by federal district courts with state criminal administration."

The appellee not having sought certiorari from the denial of his petition for a writ by the Supreme Court of California failed to exhaust the remedies of the asylum State, and the case presents no special circumstances which would render the comity rule inapplicable.

Conclusion.

In conclusion, it is respectfully submitted that the appellee, Sylvester Middlebrooks, Jr., was held in valid custody by the appellant Sheriff of Santa Barbara County in conformity with the requirements of Article IV, Section 2, Clause 2, of the Constitution of the United States and the congressional enactment regulating interstate extraditions, and also in conformity with the requirements of the Uniform Extradition Act in force and effect in the State of California.

It is further respectfully submitted that the judgment discharging and releasing the appellee from custody was erroneous and should be reversed.

Respectfully submitted,

David S. Licker,
District Attorney of the County of Santa Barbara,

Vern B. Thomas,
Assistant District Attorney of the County of Santa Barbara.

Attorneys for Appellant.

APPENDIX A.

Section 1 of Amendment XIV to the Constitution of the United States reads:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article IV, Section 2, Clause 2, of the Constitution of the United States provides:

"The person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled be delivered up, to be removed to the State having jurisdiction of the crime."

Section 3182, 18 U. S. C. (1948), formerly 1 Stat. 312-1793, Revised Stat., Sec. 5278, 18 U. S. C., Sec. 662, reads as follows:

"Whenever the executive authority of any State or Territory demands any person as a fugitive from justice of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so

charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority make such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged."

Section 1553.2 of the Penal Code of the State of California provides:

"The guilt or innocence of the accused as to the crime with which he is charged may not be inquired into by the Governor or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided has been presented to the Governor, except as such inquiry may be involved in identifying the person held as the person charged with the crime."

Section 1549.3 of the Penal Code of the State of California provides:

"Such warrant shall authorize the peace officer or other person to whom it is directed:

"(a) To arrest the accused at any time and any place where he may be found within the State;

"(b) To command the aid of all peace officers or other persons in the execution of the warrant; and

"(c) To deliver the accused, subject to the provisions of this chapter, to the duly authorized agent of the demanding State."

Section 1549.2 of the Penal Code of the State of California provides:

"If a demand conforms to the provisions of this chapter, the Governor shall sign a warrant of arrest, which shall be sealed with the State seal, and shall be directed to any peace officer or other person whom he may entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance."

Section 1548.2 of the Penal Code of the State of California provides:

"No demand for the extradition of a person charged with crime in another State shall be recognized by the Governor unless it is in writing alleging that the accused was present in the demanding State at the time of the commission of the alleged crime, and that thereafter he fled from that State. Such demand shall be accompanied by a copy of an indictment found or by information or by a copy of an affidavit made before a magistrate in the demanding State together with a copy of any warrant which was issued thereon; or such demand shall be accompanied by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding State that the person claimed has escaped from confinement or has violated the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that State; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be certified as authentic by the executive authority making the demand."

APPENDIX B.

UNITED STATES COURT OF APPEALS.

For the District of Columbia Circuit.

No. 10425

Lewis A. Johnson, alias Lewis O. Kalap, appellant, v. W. Bruce Matthews, United States Marshal, appellee.

Appeal from the United States District Court for the District of Columbia.

Submitted January 16, 1950—Decided May 1, 1950.

Mr. Philip E. Shapiro for appellant.

Mr. Richard M. Roberts, Assistant United States Attorney, with whom Mr. George Morris Fay, United States Attorney, and Mr. Joseph M. Howard, Assistant United States Attorney, were on the brief, for appellee.

Before CLARK, PRETTYMAN and BAZELON, Circuit Judges.

PRETTYMAN, *Circuit Judge:* Appellant is a fugitive from justice in the State of Georgia. He was found in the District of Columbia. The executive authority of Georgia, producing a copy of an indictment charging him with a crime there, and identifying him as the person indicted, demanded his return. He was arrested and, after a hearing, his delivery to an agent of the State of Georgia was ordered. Thereupon he presented to the United States District Court for the District of Columbia a petition for a writ of *habeas corpus*. In the petition he alleged that he had been arrested and jailed in Georgia for robbery;

that for ten months he was given no preliminary hearing, indictment[1] or trial; and that he thereupon escaped. He alleged that during his incarceration elected local officials "expended every effort" to obtain a sum of money from his wife; that during those months he was moved to three jails, where he was the victim of cruel, barbaric and inhuman treatment, in that he was most severly beaten, starved, and denied clothing or bedding by his jailers, placing his life and health in grave jeopardy. He alleged violations of the Fourteenth Amendment to the Constitution of the United States and certain sections of the Constitution of Georgia. On argument he claimed violations of the Sixth Amendment and of the Bill of Rights generally. The District Court denied the petition after hearing oral argument but declining to hear evidence upon the facts alleged as to the treatment in Georgia. This appeal followed.

Article IV, Section 2, clause 2, of the Constitution provides:

"A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the Crime."

The Constitution had hardly been adopted when dispute arose over the requirements of that provision. Pennsylvania was the demanding state and Virginia the state of

---

[1]This allegation was false on the face of the papers. He was arrested January 5, 1948. A certified copy of an indictment returned against him on February 16, 1948, is among the extradition papers.

asylum in a controversy which went to President Washington, from him to Attorney General Edmond Randolph, and from him to the Congress.[2] On February 12, 1793, an act[3] was approved which became Section 5278 of the Revised Statutes and has remained in effect with minor changes ever since. As it presently appears as Section 3182 of Title 18, United States Code, it reads:

"Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory, to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged."

In extradition matters in this jurisdiction, the Chief Judge of the United States District Court for the District of Columbia exercises the functions exercised by the executive authority of a state.

---

[2]See 2 Moore, Extradition c. II (1891).

[3]1 Stat. 302.

Habeas corpus is the proper process for testing the validity of the arrest and detention by the authorities of the asylum state for extradition purposes. But a petition for a writ for that purpose tests only that detention; it does not test the validity of the original or the contemplated incarceration in the demanding state. The Supreme Court has established the scope of the extradition inquiry and the issues which are presented by it.[4] The state cases and other federal court cases upon the subject are myriad. In essence the rule is that the court may determine whether a crime has been charged in the demanding state, whether the fugitive in custody is the person so charged, and whether the fugitive was in the demanding state at the time the alleged crime was committed.

The question before us is whether a court (either state or federal) in the asylum state can hear and determine the constitutional validity of phases of the penal action by the demanding state in respect to the fugitive or his offense. We think that it cannot do so. Authorities,

---

[4]Compton v. Alabama, 214 U. S. 1, 53 L. Ed. 885, 29 S. Ct. 605 (1909); *Ex parte* Reggel, 114 U. S. 642, 29 L. Ed. 250, 5 S. Ct. 1148 (1885); *In re* Strauss, 197 U. S. 324, 49 L. Ed. 774, 25 S. Ct. 535 (1905); Hyatt v. New York *ex rel.* Corkran, 188 U. S. 691, 47 L. Ed. 657, 23 S. Ct. 456 (1903); Biddinger v. Comm'r of Police, 245 U. S. 128, 62 L. Ed. 193, 38 S. Ct. 41 (1917); Roberts v. Reilly, 116 U. S. 80, 29 L. Ed. 544, 6 S. Ct. 291 (1885); Whitten v. Tomlinson, 160 U. S. 231, 40 L. Ed. 406, 16 S. Ct. 297 (1895); Munsey v. Clough, 196 U. S. 364, 49 L. Ed. 515, 25 S. Ct. 282 (1905); Illinois *ex rel.* McNichols v. Pease, 207 U. S. 100, 52 L. Ed. 121, 28 S. Ct. 58 (1907); Drew v. Thaw, 235 U. S. 432, 59 L. Ed. 302, 35 S. Ct. 137 1914).

sound theory government, and the practical aspect of the problem all require that conclusion.[5]

The problem is not merely one of *forum non conveniens*. It involves the interrelationship of governments, both among the states and between the states and the Federal Government. The quoted provision of the Constitution is in the nature of a treaty stipulation between the states, and compliance is a matter of agreed executive comity. In Appleyard v. Massachusetts[6] the Supreme Court said:

"The constitutional provision relating to fugitives from justice, as the history of its adoption will show, is in the nature of a treaty stipulation entered into for the purpose of securing a prompt and efficient administration of the criminal laws of the several states,—an object of the first concern to the people of the entire country, and which each state is bound, in fidelity to the Constitution, to recognize. A faithful, vigorous enforcement of that stipulation is vital to the harmony and welfare of the states. And while a state should take care, within the limits of the law, that the rights of its people are protected against

---

[5]2 Story Constitution §1809 (5th ed. 1891): "But, however the point may be as to foreign nations, it cannot be questioned that it is of vital importance to the public administration of criminal justice, and the security of the respective States, that criminals who have committed crimes therein should not find an asylum in other States, but should be surrendered up for trial and punishment. It is a power most salutary in its general operation, by discouraging crimes and cutting off the chances of escape from punishment. It will promote harmony and good feelings among the States, and it will increase the general sense of the blessings of the national government. It will, moreover, give strength to a great moral duty, which neighboring States especially owe to each other, by elevating the policy of the mutual suppression of crimes into a legal obligation. Hitherto it has proved as useful in practice as it is unexceptionable in its character."

[6]203 U. S. 222, 227-228, 51 L. Ed. 161, 163, 27 S. Ct. 122 (1906).

illegal action, the judicial authorities of the Union should equally take care that the provisions of the Constitution be not so narrowly interpreted as to enable offenders against the laws of a state to find a permanent asylum in the territory of another state."

While the provision of the Constitution, being specific in its reference to "State," may not apply to the District of Columbia, the same basic theory underlies the federal statute which clearly does apply. Both Constitution and statute are explicit and mandatory. They require—not merely suggest—that the fugitive, having been secured, be delivered to the demanding state.

The law of nations, absent treaties, contemplates that every nation control the entrance *vel non* of persons into its borders; those whom it wishes to stay, stay.[7] Since almost every nation wishes, however, to enforce its criminal laws without nullification by the criminal through the simple expedient of leaving the country, treaties of extradition are general throughout the world.[8] The complete chaos which would have enveloped law enforcement in the American colonies in the absence of extradition agreements became evident long before the Constitution was written. Such an agreement was incorporated in the Articles of Confederation.[9] Without debate it was continued in the Constitution.[10]

---

[7]2 Hyde, International Law 1012, 1015 (2 rev. ed. 1945). See also 1 Curtis, Constitution History of the United States 605-606 (1889); 2 Story, *op. cit. supra* note 5, §1808 n. (*a*); 1 Cooley, Constitutional Limitations 52 (8th ed. 1927).

[8]2 Hyde, *op. cit. supra,* note 7, at 1016 *et seq.*

[9]Art. IV, par. 2.

[10]2 Story, *op. cit. supra,* note 5, §1807; 1 Curtis, *op. cit. supra,* note 5, at 601-604; 1 Elliot, Debates 229, 272, 304 (2d ed. 1888).

The Federal Government has no function in this interstate arrangement, except that its courts may see, upon petition for *habeas corpus,* that the states abide the compact; and, of course, its territories must obey the statute. To say that the federal courts may interpose in this process their judgment of the internal processes of the states and the fidelity of their officials to their duties, is to nullify the agreement embedded in the Constitution and to reestablish the rule of the law of nations which it was intended to disestablish. The federal courts have no power to nullify a provision in the Constitution.

Of course, appellant has a right to test in a federal court the constitutional validity of his treatment by Georgia authorities. But that test cannot come as a part of the constitutional process of returning a fugitive to the state where he is charged. If this fugitive's constitutional rights are being violated in Georgia, he can and should protect them in Georgia. Not only state courts but a complete system of federal courts are there.

The basic premise of appellant's position is that he could not get fair treatment in the courts of Georgia, either state or federal. Every argument in support of power in the District of Columbia court to consider and determine whether appellant should be released because of anticipated ill-treatment by executive officers of Georgia comes in the final analysis to the essential proposition that appellant's rights would not be protected by the courts of Georgia. Those courts are there. They are charged with the duty of protecting this prisoner and any other in custody in that state. If they perform that duty, appellant would be as adequately protected by their order as he would be by an order of the court here; he would have no basis for applying to the court here.

We are asked to assume that appellant would not be protected by the courts in Georgia. We not only decline to make the assumption but we repudiate the suggestion that we make it. We will not impugn either the capacity or the integrity of the state courts of Georgia or of any other state. And even if we were to assume, upon the basis of this fugitive's allegations, that the state courts are impervious to his assertions, we would make no such assumption concerning the federal courts having jurisdiction in that state. Those courts of the United States are as capable and faithful as are the courts of this or any other jurisdiction. If that Court of Appeals errs, *certiorari* to the Supreme Court will lie.

If we will not assume the non-availability of courts in Georgia, we are asked to permit petitioner to present evidence upon that non-availability and then to determine the question. There is an established procedure for the correction of error or dereliction on the part of every court in the country, and where constitutional rights are involved the Supreme Court of the United States stands watchman over every court, state or federal. It would be an act of unwarranted arrogance for us to ascribe to ourselves virtue superior to that of other courts and so to assert power to hear and determine the faithfulness to duty of a sister court occupying a place like ours in the federal system. We have not the slightest semblance of authority over such courts. We might differ with them in opinion, but to us the availability of the Georgia federal courts to protect appellant is not "merely a presumption."

Since we have no power to make a presumption or a finding one way or the other upon the virtues or the vices of other Courts of Appeals and since we will not usurp that power, it is of no moment that we should remark

upon the subject. But it seems not inappropriate for us to comment that reported cases show the United States Court of Appeals for the Fifth Circuit to be zealous in protection of the constitutional rights of persons within its borders as is any other Court of Appeals. It was the United States District Court for the Middle District of Georgia which convicted and sentenced to the penitentiary one Screws, a sheriff, for beating a prisoner. The Fifth Circuit affirmed that conviction[11] upon constitutional principles, the Supreme Court reversing[12] on the ground that the statute[13] required a specific intent to deprive a person of a federal right and that an unnecessary beating alone is not sufficient for conviction. It was the same District Court which awarded damages to a Negro voter against the officials of a party primary election for denying the voter the right to participate in a primary, the court holding such deprivation to be a violation of right under the Fourteenth, Fifteenth and Seventeenth Amendments;[14] and the Court of Appeals for the Fifth Circuit affirmed that judgment.[15] It was the same Court of Appeals which, in Crews v. United States,[16] affirming a conviction under the federal statute making criminal a deprivation of constitutional rights under color of law, condemned that statute as "inadequate." The list of cases could be expanded.

---

[11]Screws v. United States, 140 F. 2d 662 (1944).

[12]Screws v. United States, 325 U. S. 91, 89 L. Ed. 1495, 65 S. Ct. 1031 (1945).

[13]Sec. 20 of the Criminal Code, 18 U. S. C. A., §52.

[14]King v. Chapman, 62 Fed. Supp. 639 (1945).

[15]Chapman v. King, 154 F. 2d 460 (1946), *cert. denied,* 327 U. S. 800, 90 L. Ed. 1025, 66 S. Ct. 905 (1946).

[16]160 F. 2d 746 (1947).

Appellant cites the authorities which hold that if the facts alleged in a petition for *habeas corpus* are such that, if established, they would require issuance of the writ, he must be afforded oportunity to prove his allegations.[17] We do not deviate from that rule or qualify its unequivocal terms. But, if this appellant proved the facts he alleges in respect to the penal practices of the State of Georgia, he would not be entitled to an order of the Federal District Court in this jurisdiction releasing him from a custody which is for extradition purposes only. This District Court has no power to consider and determine the constitutional validity of executive or judicial processes of the State of Georgia. Another court, not this one, has that power.

It is said that this case presents a conflict between provisions of the Constitution. It presents no such conflict. The extradition clause is a procedural provision. It does not impinge upon any substantive right of any individual and does not affect any provision of the Constitution or its Amendments protecting such rights. The provision of the Constitution[18] which provides that trial for a crime committed in Georgia shall be in Georgia does not impinge upon any constitutional right of criminal defendants in Georgia. If an accused in a federal court in Georgia cannot obtain in that district the fair and impartial trial to which he is constitutionally entitled, he applies to that court, not to some other court, for a transfer of the proceeding. That is the federal rule of criminal

---

[17]Walker v. Johnston, 312 U. S. 275, 85 L. Ed. 830, 61 S. Ct. 574 (1941); *In re* Rosier, 76 U. S. App. D. C. 214, 133 F. 2d 316 (1942); Clawans v. Rives, 70 App. D. C. 107, 104 F. 2d 240 (1939).

[18]Art. III, §2, cl. 3.

procedure.[19] That rule does not impinge upon any constitutional right of an accused. No more does the clause of the Constitution which says that a fugitive accused of a crime in Georgia shall be returned there for trial.

The argument pressed upon us on behalf of appellant is susceptible of *reducto ad absurdum*. A fugitive has neither more nor less constitutional rights than has an incarcerated prisoner. If the Georgia courts, state and federal, will not enforce the Constitution as to returned fugitives, they will not do so as to prisoners already in the State. But the rule is settled that *habeas corpus* on behalf of an incarcerated prisoner lies only in the district of his incarceration.[20] If that incarceration be in Georgia, and if we assume, as we are urged to do, that courts in Georgia would not protect a prisoner's rights, we would be compelled to conclude either that prisoners in Georgia cannot get protection or that the rule as to venue of *habeas corpus* does not apply to Georgia. The federal Atlanta penitentiary is in Georgia. If the federal courts there do not enforce the Constitution as to those prisoners, it would seem that the penitentiary ought to be moved, let a federal court in another jurisdiction, in which some federal official might be caught for service of process, order the release of those prisoners.[21]

It is said that under the doctrine urged upon us in behalf of appellant the fugitive would have to establish by adequate evidence that if returned to the demanding state he would be reasonably likely to undergo cruel and unusual punishment or be deprived of some constitutional

---

[19]Fed. R. Crim. P., 21.

[20]Ahrens v. Clark, 335 U. S. 188, 92 L. Ed. 1898, 68 S. Ct. 1443 (1948).

[21]See Johnson v. Dye, *infra*.

right. We are asked to follow the lead of the Third Circuit in Johnson v. Dye.[22] We therefore turn to that case to ascertain the nature of the procedure contemplated. The proof there consisted of the testimony of the fugitive himself and that of other escaped convicts and one prisoner incarcerated by Pennsylvania authorities, supported by articles in "Life" and "Time" magazines and the newspaper "P. M." Those witnesses testified that prisoners in Georgia are treated with persistent and deliberate brutality. In so far as "Life" magazine showed that such past abuses had been obliterated, it was contradicted by the witnesses. The State of Georgia offered no testimony. We are told that a similar pattern of presentation is to be contemplated in the case at bar or in other similar cases.

---

[22]175 F. 2d 250 (1949). That case was reversed by the Supreme Court (338 U. S. 864 (1949)) without opinion and without dissent, upon a single reference, "*Ex parte* Hawk, 321 U. S. 114." *Ex parte* Hawk contained no reference to extradition. It concerned procedure in *habeas corpus* in the federal court having jurisdiction in the state where the petitioner was indicted, convicted, sentenced and incarcerated. The petitioner there was thus confined in the Nebraska State Penitentiary under sentence for murder imposed by a Nebraska District Court. The *habeas corpus* was sought in the United States District Court for Nebraska. The Supreme Court held that he must exhaust his remedies in the courts of Nebraska. Applying the doctrine of that case to Johnson v. Dye—and to the case at bar—the petitioner would be required to exhaust his remedies in the courts of Georgia before resorting to the federal courts. If the Supreme Court, in Johnson v. Dye, meant that the petitioner must exhaust his remedies in the Pennsylvania courts (where he was being held for extradition only), it meant that those courts had jurisdiction to entertain, and so to grant, his petition upon the grounds he alleged. That would have been a revolutionary reversal of all the cases ever written upon the subject, and we have serious doubt that the Court intended to accomplish that result without argument and without opinion. Rather it seems more reasonable that the Court meant, by citing *Ex parte* Hawk, to tell the petitioner to apply first to the state courts of Georgia which had jurisdiction over the executive officials against whom he was complaining.

That prisoners and fugitives from justice frequently allege beatings and starvation by police or prison officers is demonstrated by reference to almost innumerable cases. Pennsylvania, in the Third Circuit, does not appear to have been immune from these allegations. In Commonwealth v. Brown,[23] a 1933 case, a mulatto boy prisoner claimed that he was denied bread and water for about forty hours and beaten with a blackjack—some 15 or 20 blows—by the Philadelphia police. The trial court ridiculed his evidence as to the brutality, the Superior Court reversing the conviction for that reason. If fugitives from the District of Columbia were to testify in distant states as they sometimes testify in the District Court here, and if they were not contradicted, they would picture frequent and deliberate beatings of prisoners here. Given rein and no prospect of contradiction, and spurred by hope of refuge, fugitives from this jurisdiction would probably describe "revolting barbarities" in the Nation's Capital just as was done in respect to Georgia in Johnson v. Dye, *supra*.

The State of Georgia failed to appear in Johnson v. Dye, and the same situation might reasonably occur in any similar case. In the first place, the Governor of a demanding state may well believe that a United States District Court in some distant district has no jurisdiction to consider and determine the constitutionality of the penal practices of his state. He might decline to concede the contrary or even to appear to do so.

In the next place, the budgets of the state probably do not include funds for the transportation and compensation of lawyers and parties of executive officials to

---

[23]309 Pa. 515, 164 Atl. 726.

various distant points to combat the testimony of fugitives as to probable penal treatment of returned prisoners. The interests of the citizens may not, in the opinion of the Governor and the Legislature, justify expenditures in large amounts for such purposes, if the asylum state wants to retain the fugitives. The presence of these persons in their state may not be worth any considerable sum of money to them. Having performed their duty under the Constitution by requesting extradition, with a disclosure of the facts concerning the fugitive, they might be content to let the matter rest there, if the asylum state wishes to grant refuge.

It is conceivable that executive authorities in some states might welcome the establishment of areas of refuge distant from their own responsibility to which undesirables might flee and leave no burden of duty upon their home officials. This possibility is suggested in the concurring opinion in Johnson v. Dye. It is there stated that 175 other prisoners escaped at the same time as did Johnson, that one of the other fugitive witnesses testified that the Warden observed his departure but made no objection, and that the Chief of Police paid his bus fare from Thomasville to Atlanta. Judge O'Connell, in the concurring opinion, observed: ". . . I entertain considerable doubt whether an impenitent Georgia administration would be deeply grieved by a decision which permits Georgia to utilize the other 47 states as penal colonies for its 'escaped' prisoners."[24]

The chaos into which the enforcement of criminal law would be plunged by the doctrine urged upon us by appellant is as readily discernible now as it was when the

---

[24] *Supra* at 257.

Colonies first made what is now the existing agreement. The case before us concerns Georgia. The next might concern Alabama. The question there might be whether casually attended, ununiformed laborers with chains attached to their legs, at work in the open air on country roads, are undergoing cruel and unusual punishment. The next case might concern New York or Illinois, and the question might be whether serried, shaved and numbered robots in the monotony of gray walls, or in occasional solitary confinement in darkened cells on bread and water, are suffering cruel and unusual punishment. And so a pattern of opinion in this jurisdiction concerning the penal practices of all the forty-eight states would in time necessarily develop. The authors of the succinct note on "The Third Degree" in the Harvard Law Review[25] say: ". . . one is driven to the conclusion that the third degree is employed as a matter of course in most states. . . ." The same patchwork of return-or-no-return would develop in each of the forty-eight states as to each of the other forty-seven and the District of Columbia, if the courts of each were to determine for themselves the probable penal treatment in each of the others; and the patchwork would include the rules of each of the federal circuits as to each of the states and each of the other circuits.

The resultant confusion is apparent, and the resultant animosity among states and between the states and the Federal Government are as readily discernible. In the case urged upon us as authority, the Governor and the state courts of the asylum state (the trial court and the

---

[25]43 Harv. L. Rev. 617, 618 (1930). See also 1 Am. J. Police Sci. 575 (1930).

court of intermediate appeal, where the case ended) refused to free the fugitive. When application for a writ was made to the federal court, they opposed the petition. The federal appellate court, Judge O'Connell commented, "turn[ed] loose a convicted murderer among the law-abiding citizens of Pennsylvania, a state which ha[d] expressly refused to harbor him." The confusion and the animosity which would result from the course urged upon us are compelling reasons why we should not adopt it, just as they were compelling reasons for the provision in the Constitution in the first place.

We find ourselves in disagreement with the United States Court of Appeals for the Third Circuit in its opinion in Johnson v. Dye.

The judgment of the District Court is

Affirmed.

BAZELON, *Circuit Judge,* dissenting: Just as certain rights—those of freedom of speech, press, assembly, religion, etc.—have been said to stand in a "preferred position" under our Constitution, so also would I include within that group the right of the individual to be free from cruel and unusual punishment and to be tried for a crime of which he is accused. The latter is to the individual what the former is to the body politic and both must be the object of zealous concern if our concept of liberty is to be preserved. Accordingly, I am unable to agree that this court is barred from inquiring into charges as grave as those made by petitioner here. In expressing this dissent, I am well aware of the factors of history, policy and precedent underlying the position

of the majority. But I have been cited to no controlling authority in which this particular question—viz., the availability of extradition where there has been cruel and unusual punishment or the denial of a right to trial—has been decided.

The obvious importance of the federal system, and the desire to facilitate its workings, should not obscure the fact that action in pursuance of one constitutional power may run afoul of another. Unless the Constitution is read as a whole, there is grave danger that the extradition process will be executed in unduly mechanistic fashion and in complete disregard of the fundamental considerations of humanity and decency which are reflected in the Bill of Rights. Certainly, the interest of the various governments of our federal system in the orderly workings of the extradition machinery is a factor of moment. And in such interest, it may ordinarily be desirable to limit the inquiry on habeas corpus to the three or four traditional questions posed in such cases. But where one constitutional purpose must be weighed against another—one promoting efficiency and comity between states, the other protecting fundamental rights of the individual against state infringement—our system of government will be better served by assessing greater weight to the latter. Serious doubt concerning the effectiveness of future guarantees of such fundamental rights ought not to be resolved by speculation or presumption that somehow, somewhere, but not here, some court will be able to prevent a repetition of past abuses.

Petitioner's allegations below are that he has been subjected to cruel and unusual punishment and that he has been imprisoned for ten months without being brought to trial. For the purpose of this appeal, we are bound to

accept these grave allegations as true. Yet, under the majority view, they may not be considered, regardless of the content petitioner may be able to give to them. Even if petitioner can prove, in a hearing on the merits under these allegations, that he will never get to trial in Georgia, or that he will not get *access* to *any* court in that state because of the cruel and unusual punishment which may cause his death before that time, his release could not be secured on habeas corpus.

This court rests its conclusion in large part on the availability of the Georgia state courts and of the Georgia federal courts to protect petitioner. It thus raises what is merely a presumption—that the law will follow its ordinary course and that officials will act properly—to the level of a conclusive rule of law. It should be clearly understood that I make no assumption that state or federal courts in Georgia will be unavailable. It is the majority which makes their availability an absolute and bars any attempt on the part of petitioner to show the extent of their unavailability. I would treat the regularity of official action as a rebuttable presumption to be tested in the light of facts, rather than by speculation within the bare frame of pleadings. This view does not entail disrespect for the Georgia state or federal courts, nor any doubt as to their capability, integrity or faithfulness to the Constitution and its Bill of Rights. In fact, it makes the majority's reference to such considerations completely irrelevant. It does, however, take account of the notorious facts concerning recurrent penal practices in many of our states, not alone Georgia. It considers the very real possibility that those courts may never have the opportunity to safeguard rights such as those involved here,

that the harm may be done before the judicial process can even be brought into play.

I think we should follow the lead of the Third Circuit in Johnson v. Dye, 175 F. 2d 250 (3 Cir. 1948),[1] at least to the extent that it is based on the premise that allegations such as those involved here may be heard on the merits. In that case, petitioner, who had been convicted of murder in Georgia, sought to resist by way of habeas corpus an extradition warrant issued against him in Pennsylvania. He alleged cruel and unusual punishment inflicted on him in a Georgia chain gang and was permitted to argue on the merits. The court, sitting *en banc,* ordered his release, saying: "* * * the right to

---

[1]Reversed per curiam by the Supreme Court in 338 U. S. 864 (1949), citing only *Ex parte Hawk*, 321 U. S. 114 (1944). That case decided that all remedies in the state of detention must be exhausted by one held in the custody of that state before he could petition for habeas corpus in the federal courts. The state there was Nebraska and the attempt was made to get into the federal courts before all Nebraska remedies had been exhausted. The very same question was involved in Johnson v. Dye. There, too, the petitioner in the United States District Court in Pennsylvania had not exhausted his state remedies—*i. e.,* he had not appealed from the decision of Pennsylvania's Court of Common Pleas, affirmed by the Superior Court, to the state Supreme Court. It was because of this very similarity of issues that the Third Circuit devoted a substantial portion of its opinion to an attempt to carve out an exception to the rule of exhaustion of state remedies in habeas corpus. It was this argument which the Supreme Court rejected by its cursory reference to *Ex parte Hawk*. The *Hawk* case had nothing to do with extradition. *It did not involve the question of remedies in a foreign jurisdiction.* To read into a per curiam reversal which is so clearly procedural in origin a repudiation of the substantive decision of the Third Circuit is to depart far indeed from the Supreme Court's obvious meaning. It is as if this court were held to have tested the merits of allegations which it refuses to consider because of a failure to exhaust administrative remedies.

The doctrine of exhaution of state remedies in habeas corpus, designed to prevent premature abandonment of state remedies in search of federal relief, is of course inapplicable here in the District of Columbia.

be free from cruel and unusual punishment at the hands of a State is as 'basic' and 'fundamental' a one as the right of freedom of speech or freedom of religion" [175 F. 2d at 255] and hence was included within the scope of the liberty guaranteed by the Fourteenth Amendment. "The obligation of a State to treat its convicts with decency and humanity is an absolute one and a federal court will not overlook a breach of that duty" [*Id.* at 256]. I disagree with the opinion of the majority in that case, however, to the extent that it makes the fact of *past* infringement alone the basis of release on a petition for habeas corpus in extradition cases. Instead, I would follow the rationale suggested by Judge O'Connell who concurred in part and dissented in part. He felt that the court "need not, and should not, declare that the drastic remedy [release of petitioner] here announced is one which will lie whenever there has been, in the past, an infliction of cruel and unusual punishment. I deem it sufficient that we invoke our power to release an individual who not only has suffered cruel and unusual punishment but also *faces grave and imminent danger of like abuse and very possibly even death by extra-legal means, if he is returned to Georgia.* If * * * this court must choose between past and prospective violation of a basic constitutional right as the ground for release of an individual, I should prefer to place reliance upon the latter [*Id,* at 258-9]. * * * The logic of invoking the judicial power to eliminate a threatened invasion of a basic constitutional right seems to me irresistible * * *. Could this penalty be served [in Georgia], with observance of those constitutional rights which prisoners retain, * * * I think it would be both unwise and improper for this court to restrain Pennsylvania from honoring a

request by Georgia for his extradition" [*Id.* at 259]. [Emphasis supplied.]

I would remand the case to the District Court for a hearing on the merits, the objective being to escertain whether Johnson has suffered the alleged infringements and "would be reasonably likely to undergo similar abuse if he were returned to Georgia" [*Id.* at 259]. It may well be that petitioner will be unable to prove his allegations or to show such facts as would result in his securing relief. His burden of proof would undoubtedly be great. We might be unwilling to accept the sort of proof relied upon by the Third Circuit and referred to by the majority here. But I cannot bring myself to concur in a view which forecloses all opportunity of showing the extent to which basic rights have been infringed. Unless such an opportunity is afforded petitioner, there can be no accurate assessment of competing constitutional considerations.

It is regrettably true that my view, as the majority quotes from Judge O'Connell's opinion in the *Dye* case, "[might] turn loose a convicted murderer."[2] Nevertheless, I am in thoroughgoing agreement with Judge O'Connell's further statement: "* * * better it be that a potentially dangerous individual be set free than that the least degree of impairment of an individual's basic constitutional rights be permitted" [*Id.* at 257-8].

---

[2]In the present case, of course, petitioner was accused of robbery and had not yet come to trial.

In the
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12572

JOHN D. ROSS,
Sheriff of Santa Barbara County, California,
Appellant

vs.

SYLVESTER MIDDLEBROOKS, JR.,
Appellee.

BRIEF OF THE STATE OF GEORGIA AS AMICUS CURIAE

EUGENE COOK,
Attorney General of Georgia

M. T. BLACKSHEAR, JR.,
Deputy Assistant Attorney General of Georgia

LAMAR W. SIZEMORE,
Assistant Attorney General of Georgia

EDWARD E. DORSEY,
Atlanta, Georgia,
Of Counsel.

INDEX

TABLE OF AUTHORITIES

In the
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12572

JOHN D. ROSS,
Sheriff of Santa Barbara County, California,
Appellant

vs.

SYLVESTER MIDDLEBROOKS, JR.,
Appellee.

BRIEF OF THE STATE OF GEORGIA AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

Appellee Middlebrooks is a fugitive from the justice of Georgia whose return to confinement under sentence was and is sought.

STATEMENT OF THE CASE

Appellee was convicted of the felony of burglary in Georgia and was sentenced to five years' imprisonment; escaped, and eventually was found in the custody of United States military authorities in California. The Governor of Georgia filed requisition for warrant of extradition with the Governor of California, who issued his rendition warrant directed to the appellant herein, John D. Ross, Sheriff of Santa Barbara County. Ross apprehended appellee, who then filed application for the writ of habeas corpus

in the Superior Court of California, which was denied. He filed successive appeals to the Court of Appeals and Supreme Court of California which were denied, and then filed two separate unsuccessful applications for stay of execution of the denial of the writ before individual Justices of the Supreme Court of the United States, both of which applications were denied. Whereupon, appellee filed his application for the writ of habeas corpus in the United States District Court for the Southern District of California, Central Division.

In the proceedings in that court there apparently was no question as to the identity of appellee Middlebrooks as being the person described in the warrant, nor as to the fact that he had been sentenced by a Georgia court and had subsequently escaped confinement; nor were the form and sufficiency of the requisition for extradition nor of the rendition warrant questioned.

The District Court heard evidence on the method of appellee's trial and conviction in Georgia, and on the circumstances of his confinement in Georgia. All evidence on these matters was timely and appropriately objected to by counsel for appellant. The District Court found that the method of trial, and the sentence and punishments of appellee by Georgia constituted denial of due process by the State of Georgia in violation of appellee's constitutional rights; that the action of California in granting Georgia's requisition and arresting respondent likewise constituted violation of appellee's constitutional rights; that appellee had exhausted the remedies provided by the State of California and was not required to exhaust the remedies provided by the State of Georgia, that the Fourteenth

Amendment prevails over other parts of the Constitution or statutes of the United States or of a State.

The State of Georgia made no appearance in the District Court, and adduced no evidence, but did file a legal brief as amicus curiae which was accepted by the trial court (R. 106).

SUMMARY OF POSITION OF THE AMICUS CURIAE

I.

(a) The scope of inquiry on application for habeas corpus to avoid extradition is confined to determination of the following questions:

(1) Whether a crime has been charged in the demanding state.

(2) Whether the person in custody is the person so charged.

(3) Whether such person is a fugitive.

(4) The correctness of the extradition requisition and warrants.

(b) The Federal and State courts of the asylum state are without jurisdiction to inquire into matters outside the scope of the questions above stated, and the District Court erred in so doing.

II.

The court below was without jurisdiction to determine the question of alleged invasion of the constitutional rights of appellee by Georgia because:

(a) Such allegations do not enlarge the scope of the hearing on extradition beyond the traditional limits;

(b) The state remedies available for the correction of invasion of constitutional rights have not been exhausted.

III.

The effect of the decision of the court below, if allowed to stand, would be to cause chaos and confusion in the penal systems of all the states of the Union.

IV.

The decision of the court below is in conflict with the decisions of two of the United States Courts of Appeals.

ARGUMENT AND CITATION OF AUTHORITY

I.

The scope of inquiry on application for habeas corpus to combat extradition is stringently limited, and the Federal and State courts of an asylum state are without jurisdiction to inquire into matters outside such limits.

Appellee's petition for the writ (R. 2) and his own testimony (R. 133, et sequitur) state that he was convicted of the felony of burglary, that he escaped imprisonment (R. 161), and is a fugitive. His petition does not challenge the sufficiency or correctness of Georgia's requisition for extradition nor of California's rendition warrant.

Instead, appellee's case is based on allegations that he was unconstitutionally tried, sentenced, and imprisoned (R. 3 and 4).

The trial court admitted evidence by appellee in-

tended to prove that such trial, sentence, and imprisonment violated respondent's constitutional rights, all such evidence being admitted over the objection of appellant (R. 123) and his motion to dismiss the writ (R. 120).

The basic conflict between appellant and appellee at the trial and now, was that appellee insisted that the District Court could and should hear evidence on and review the legality and constitutionality of his trial and imprisonment, while appellant insisted that the scope of inquiry was stringently limited to the determination of certain specific questions not having to do with the substance of appellee's conviction or sentence, but rather with their occurrence, and proper certification in the extradition papers. The issue was clearly formed (R. 121-122), and the trial court decided it for the prisoner and against appellant.

In essence, the basic question, then, is simply whether the trial court in passing on an attempted extradition may judicially consider and determine the legality of the fugitive's trial and imprisonment, or whether the function of the court is confined to the merely ministerial, mechanical determination of whether the extradition papers are in order, and applicable to the person in custody.

This question was definitively answered in the year 1861 by the Supreme Court of the United States in the case of

> Commonwealth of Kentucky v. Dennison, 24 How. 66,

in which Mr. Chief Justice Taney, speaking for the court, made it clear that the duty of the Governor of an asylum state was purely a ministerial one. Taney

abhorred the possibility that one state might retry and redetermine according to its own laws whether or not the demanded fugitive was guilty of a crime in the demanding state. He said:

> "The argument on behalf of the Governor of Ohio, which insists upon excluding from this clause (the extradition clause of the Constitution) new offences created by a statute of the State, and growing out of its local institutions, and which are not admitted to be offences in the State where the fugitive is found, nor so regarded by the general usage of civilized nations, would render the clause useless for any practical purpose. For where can the line of division be drawn with anything like certainty? Who is to mark it? The Governor of the demanding State would probably draw one line, and the Governor of the other State another. And, if they differed, who is to decide between them? Under such a vague and indefinite construction, the article would not be a bond of peace and union, but a constant source of controversy and irritating discussion. It would have been far better to omit it altogether, and to have left it to the comity of the States, and their own sense of their respective interests, than to have inserted it as conferring a right, and yet defining that right so loosely as to make it a never-failing subject of dispute and ill-will."

The rule which makes extradition a ministerial function has been frequently restated by the Supreme Court from time to time over the years of this country's history without deviation. That court has frequently held that in habeas corpus proceedings brought to combat extradition, the only questions open to inquiry are those

which will determine whether the extradition papers are properly drawn and supported, and whether the proper individual is in custody. For example, in

Biddinger v. Commissioner of Police, (1917) 245 U. S. 128,

the court said:

> "This much, however, the decisions of this Court make clear: that the proceeding is a summary one to be kept within narrow bounds not less for the protection of the liberty of the citizen than in the public interest; that when the extradition papers required by the statute are in the proper form, the only evidence sanctioned by this Court as admissible on such a hearing is such as tends to prove that the accused was not in the demanding state at the time the crime is alleged to have been committed, and frequently and emphatically that defenses cannot be entertained on such a hearing but must be referred for investigation to the trial of the case in the courts of the demanding State."

And again, in Mr. Justice Holmes' famous opinion in the case of

Drew v. Thaw (1914), 235 U. S. 432,

it was said:

> "When, as here, the identity of the person, the fact that he is a fugitive from justice, the demand in due form, the indictment by a Grand Jury for what it and the Governor of New York allege to be a crime in that State, and the reasonable possibility that it may be such, all appear, the constitutionally required surrender is not to be interfered with by the summary process of habeas corpus upon speculations as to what ought to be the result

of a trial in the place where the Constitution provides for its taking place. We regard it as too clear for lengthy discussion that Thaw should be delivered up at once."

And, see

Compton v. Alabama (1909) 214 U. S. 1;
Ex parte Reggel (1885) 114 U. S. 642;
In re Strauss (1905) 197 U. S. 324;
Hyatt v. New York ex rel. Corkran (1903) 188 U. S. 691;
Roberts v. Reilly (1885) 116 U. S. 80;
Whitten v. Tomlinson (1895) 160 U. S. 231;
Munsey v. Clough (1905) 196 U. S. 364;
People of State of Illinois ex rel.
McNichols v. Pease (1907) 207 U. S. 100;
Johnson v. Matthews (1950) 182 F. 2d, 677.

See also *Volume* 2, *Stanford Law Review*, 174, and 47 *Columbia Law Review*, 470.

Clearly these cases are part of the same pattern which was conceived not by any Justice of the Supreme Court nor by Congress, though it has been stated and implemented by each, but rather by the framers of the Constitution. They foresaw with surprising clarity, perhaps sharpened by actual experience, that interstate extradition was a delicate matter; the constitutional provision is clear and so, indeed, is the extradition statute (Title 18 USC § 3182), which was originally enacted in 1793, and has remained basically the same until the present time.

The mandate of the Constitution is clear: Let each State decide for itself what acts shall be criminal and how it shall be determined; let every other State respect that decision. Full faith and credit has as much

meaning here as in any civil field of decision. As was said in

> Appleyard v. Massachusetts (1906) 203 U. S. 222,
> "A faithful, vigorous enforcement of that stipulation (the constitutional provision relating to extradition) is vital to the harmony and welfare of the State."

II.

The Court below was without jurisdiction to determine the question of alleged invasion of the Constitutional rights of appellee.

Faced with the insurmountable barriers of the Supreme Court decisions stringently confining the issues on an application for habeas corpus in extradition proceedings, appellee has attempted to overcome them by ignoring them. These decisions which limit the inquiry are not applicable, as appellee argues, when the fugitive sought to be extradited alleges that he has been denied due process by the demanding state. In short, appellee would change the character of the proceedings from an extradition matter to a hearing to determine the constitutionality of the fugitive's original conviction.

All the issues which a demanding state must gain to extradite a fugitive were admitted in the court below, but they were hardly deemed worthy of notice by that trial court. It was not extradition with which the court was concerned but due process, and the court, accepting appellee's view of the proceeding, tried not an extradition case but an application for habeas corpus under the Fourteenth Amendment.

The basis of jurisdiction in the proceeding in the court below is perhaps at the heart of the confusion surrounding the court's decision. It should be emphasized that the basis of the court's jurisdiction was not the Fourteenth Amendment nor the Eighth nor any part of the Constitution except Article IV, Section II, Clause II.

There were two basic obstacles to the acceptance by the court below of jurisdiction to try not only the issues constitutionally present on an extradition proceeding, but the due process provided by the judicial and penal system of Georgia as well:

(a) *The scope of inquiry on application for habeas corpus to combat extradition remains limited regardless of allegations of invasion of constitutional rights.*

Appellee's facile effort to cause the court to disregard the rule limiting the scope of hearing upon an application for habeas corpus to combat extradition on the ground that his constitutional rights had been invaded by the demanding state did not present a novel question. The very cases which have delimited the scope of such inquiry, in large part, involve similar allegations of invasion of constitutional rights. For example, see

Biddinger v. Commissioner of Police (supra);
Marbles v. Creecy (1909) 215 U. S. 63;
Whitten v. Tomlinson (supra).

The bare allegation that a constitutional right has been violated by the demanding state is not sufficient to enlarge the scope of the hearing. See Parker, Limiting the Abuse of Habeas Corpus (1948) 8 F.R.D. 171.

(b) *The State remedies available for the correction of invasion of constitutional rights have not been exhausted.*

The second obstacle to the acceptance of jurisdiction to try the constitutionality of Georgia's penal and judicial system was that the remedies provided by the State of Georgia for the correction of invasion of a prisoner's constitutional rights had not been exhausted.

Since the case of

Ex Parte Hawk (1944) 321 U. S. 114

and the subsequent codification of the rule therein (Title 28 U.S.C. § 2254), an applicant for habeas corpus detained under state process must exhaust the remedies available in the State courts before the Federal courts may assume jurisdiction, and this rule is applicable in habeas corpus to avoid extradition,

Dye vs. Johnson (1949) 338 U. S. 865

Appellee has made a token compliance with this requirement by purporting to exhaust the remedies available in the courts of California.

That is, he has sought to have the courts of California hear and determine the question of whether his trial, sentence, and imprisonment by Georgia was legal, proper, and constitutional.

There can be no question but that such a hearing and determination by California would be exactly such a proceeding as was specifically forbidden by the decision of the Supreme Court in

Kentucky v. Dennison (supra)

and the long line of forceful and controlling authorities reiterating that rule.

If the decision of the trial court be correct, then the evils which Chief Justice Taney foresaw and the Supreme Court forbade have nevertheless come full into being, and the rule of the Dennison case is discarded and forgotten, and with it the principle which Holmes saw as being "too clear for lengthy discussion."

Nor can it be argued that since California is barred by Supreme Court mandate from hearing appellee's charges, the requirement of Ex Parte Hawk (supra) is not applicable. Such a rule would make the doctrine of exhaustion of state remedies meaningless, for there are state remedies existent and they are available: They are the remedies provided by the State of Georgia.

Just as the Constitution and Supreme Court decisions have barred an asylum state from providing remedies designed to retry the conviction and detention of a prisoner, so have they required that the sentencing state provide such remedies, or have the Federal courts provide them in its stead

(White v. Ragen (1944) 324 U. S. 760).

Georgia has provided such remedies, and they are adequate. The Constitution of the State of Georgia of 1877, and the Constitution of the State of Georgia of 1945, prohibit cruel and unusual punishment, and provide that the writ of habeas corpus shall not be suspended. Constitution of the State of Georgia, Article I, Section I, Paragraphs IX and XI. The constitutional provision providing for habeas corpus has been implemented by statute. Georgia Code, Title 50, Section 101.

It must be pointed out that Section 2254 does con-

tain an excepting clause which provides that the Federal courts shall have jurisdiction if "there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." Respondent impliedly urged this exception upon the court, and the court apparently did in fact accept jurisdiction on this basis.

The allegation of fear of physical violence in similar circumstances is common, and when such tales of cruelty are related without contradiction there seems always to be an answering wave of compassion from judges perhaps more eager to protect the helpless than to question their own credulity. Some historic remnant of the ancient doctrine of "right of asylum" tends to reappear. This has been from time to time criticized

(Lascelles v. Georgia (1893) 148 U. S. 537).

The understandable propensity of fugitives for describing their prison confinement in crimson colors has been scientifically and judicially recognized and deprecated:

Johnson v. Matthews (1950) 182 F. 2d 677 at 683;
43 Harv. L. Rev. 617
1 Am. J. Police Sci. 575.

In Marbles v. Creecy (supra),
on a comparable point, the Supreme Court said:

> "It is clear that the executive authority of a State in which an alleged fugitive may be found, and for whose arrest a demand is made in conformity with the Constitution and laws of the United States, need not be controlled in the discharge of his duty by considerations of race or color, nor by a mere

> suggestion—certainly not one unsupported by proof, as was the case here—that the alleged fugitive will not be fairly and justly dealt with in the State to which it is sought to remove him nor be adequately protected, while in the custody of such State, against the action of lawless and bad men. The court that heard the application for discharge on writ of habeas corpus was entitled to assume, as no doubt the Governor of Missouri assumed, that the State demanding the arrest and delivery of the accused had no other object in view than to enforce its laws, and that it would, by its constituted tribunals, officers and representatives, see to it not only that he was legally tried, without any reference to his race, but would be adequately protected while in the State's custody against the illegal action of those who might interfere to prevent the regular and orderly administration of justice."

It is true that Georgia introduced no evidence to contradict the allegations and testimony of appellee concerning cruel treatment, Georgia having taken in the trial court the position here urged, that is, that such matters may not properly be considered by the Court in an extradition hearing, and there being a real question whether the return of a fugitive is monetarily worth the expense of transporting attorneys and witnesses some three thousand miles for each of the several proceedings.

The decision of the trial court would seem to question the efficacy of the protection to be provided a prisoner by the judiciary of Georgia. Such an assumption is improper, for as the Supreme Court said in

Wade v. Mayo (1946) 332 U. S. 672,

> "State courts are duty bound to give full effect to Federal constitutional rights, and it cannot be assumed that they will be derelict in their duty."

Further, it cannot be overlooked that the Federal courts also sit in Georgia, nor have those courts been derelict in their protection of the rights of the oppressed. In

> Johnson v. Matthews (1950) 182 F. 2d 677 at 681,

the United States Court of Appeals for the District of Columbia Circuit said:

> ". . . it seems not inappropriate for us to comment that reported cases show the United States Court of Appeals for the Fifth Circuit to be as zealous in protection of the constitutional rights of persons within its borders as is any other Court of Appeals. It was the United States District Court for the Middle District of Georgia which convicted and sentenced to the penitentiary one Screws, a sheriff, for beating a prisoner. The Fifth Circuit affirmed that conviction upon constitutional principles, the Supreme Court reversing on the ground that the statute required a specific intent to deprive a person of a federal right and that an unnecessary beating alone is not sufficient for conviction. It was the same District Court which awarded damages to a Negro voter against the officials of a party primary election for denying the voter the right to participate in a primary, the court holding such deprivation to be a violation of rights under the Fourteenth, Fifteenth and Seventeenth Amendments; and the Court of Appeals for the Fifth Circuit affirmed that judg-

ment. It was the same Court of Appeals which, in Crews v. United States, affirming a conviction under the federal statute making criminal a deprivation of constitutional rights under color of law, condemned that statute as 'inadequate.' The list of cases could be expanded."

Thus, it will be seen that there is no harshness in the rule which so narrowly delimits the scope of inquiry in extradition proceedings, for no fugitive is deprived of any constitutional right, but for the sake of order and interstate relations, he is required to seek his redress for invasion of such rights in the State and Federal courts of the demanding state.

Apparently it was argued in the court below that if appellee were required to exhaust the remedies provided by Georgia, his case would become moot inasmuch as he would have to return to Georgia to make use of the remedies available there. The flaw in such an argument is that it postulates that appellee's case was directed against his extradition, when actually, as has been shown, it was directed against the legality of his original trial and sentence. He argues against extradition on due process grounds, but refuses to comply with the requirements for presenting a due process case to the Federal courts basing his refusal on extradition grounds. If returned, he may properly have his day in court for it is elementary that so long as a prisoner is detained under a sentence he may contest such detention by habeas corpus repeatedly and without any question of mootness arising.

III.

Effect of the findings of fact and conclusions of law made by the trial court.

The effect of the findings of fact and conclusions of law made by the trial court would constitute, if allowed to stand, a legal precedent for freeing any fugitive from the prisons of Georgia, or for that matter, the prisons of any state, for it can hardly be questioned that the chaotic effect of the decision of the court below, if allowed to stand, may spread to other states. In

Johnson v. Matthews (supra),

the court said, in referring to the effect of such a decision,

> "The chaos into which the enforcement of criminal law would be plunged by the doctrine urged upon us by appellant is as readily discernible now as it was when the Colonies first made what is now the existing agreement. The case before us concerns Georgia. The next might concern Alabama. The question there might be whether casually attended, ununiformed laborers with chains attached to their legs, at work in the open air on country roads, are undergoing cruel and unusual punishment. The next case might concern New York or Illinois, and the question might be whether serried, shaved and numbered robots in the monotony of gray walls, or in occasional solitary confinement in darkened cells on bread and water, are suffering cruel and unusual punishment. And so a pattern of opinion in this jurisdiction concerning the penal practices of all the forty-eight states would in time necessarily develop."

IV

The United States Court of Appeals for the First Circuit, in

Lyon v. Harkness, 151 F. 2d 731,
and the United States Court of Appeals for the District of Columbia Circuit, in

Johnson v. Matthews (supra)
have entered decisions in direct conflict with the decision of the court below.

The decision of the United States Court of Appeals for the Third Circuit in

Johnson v. Dye, 175 F. 2d 250,
upon which much of the District Court's decision in the instant case was based, has, of course, been reversed by the United States Supreme Court,

Dye v. Johnson (1949), 338 U. S. 865,
by memorandum decision making reference to Ex Parte Hawk (supra).

It is the residual question left by the Supreme Court in the Dye case which is the subject of this litigation.

CONCLUSION

As Georgia views this case, the court below erred in considering matters extrinsic to the narrow scope of permitted inquiry. The excursion attempted by the court beyond these narrow walls being unauthorized, all such extramural findings and rulings are worthless.

The court below was without jurisdiction to hear an application for habeas corpus based on the Fourteenth Amendment until remedies available in the State courts had been exhausted, and remedies provided by the State courts of California were not available to appellee under the doctrine of limited scope of inquiry on extradition proceedings. The State of Georgia provides adequate remedies for redress of violations of constitutional rights, and the remedies provided by the State have not been exhausted.

Respectfully submitted,

EUGENE COOK, Attorney General of Georgia.

M. H. BLACKSHEAR, JR., Deputy Assistant Attornew General of Georgia.

LAMAR W. SIZEMORE, Assistant Attorney General of Georgia

EDWARD E. DORSEY, Of Counsel.

APPENDIX

Constitution of the United States:

Art. IV, Section 2, Clause 2:

Fugitives from justice. A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

Title 28, *United States Code, Section* 2254:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

Constitution of the State of Georgia of 1877 *and Constitution of the State of Georgia of* 1945, *Art.* 1, *Sec.* 1, *Pars.* 9 *and* 11.

"*Paragraph IX. Bail; fines; punishment; arrest, abuse of prisoners.* Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted; nor shall any person be abused in being arrested, while under arrest, or in prison."

"*Paragraph XI. Habeas corpus.* The writ of Habeas Corpus shall not be suspended."

Georgia Code Ann., Title 50, *Sec.* 50-101.

"Any person restrained of his liberty under any pretext whatever, or any person alleging that another, in whom for any cause he is interested, is restrained of his liberty or kept illegally from the custody of the applicant, may sue out a writ of habeas corpus to inquire into the legality of such restraint."

No. 12572

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN D. Ross, Sheriff of Santa Barbara County, California,

Appellant,

vs.

SYLVESTER MIDDLEBROOKS, JR.,

Appellee.

BRIEF FOR APPELLEE.

A. L. WIRIN,
257 South Spring Street, Los Angeles 12,

LOREN MILLER,
129 West Third Street, Los Angeles 12,

ELIZABETH MURRAY,
17 East Carrillo Street, Santa Barbara,

NANETTE DEMBITZ,

Attorneys For Appellee.

The Myers Legal Press, Los Angeles. Phone VAndike 9007.

TOPICAL INDEX

PAGE

IV.

V.

TABLE OF AUTHORITIES CITED

STATUTES PAGE

TEXTBOOKS

No. 12572

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN D. Ross, Sheriff of Santa Barbara County, California,

Appellant,

vs.

SYLVESTER MIDDLEBROOKS, JR.,

Appellee.

BRIEF FOR APPELLEE.

Jurisdiction.

Appellee filed a petition for a writ of habeas corpus in the District Court of the United States, Southern District of California, Central Division, on November 21, 1949, seeking his release from the custody of appellant, the sheriff of Santa Barbara County, California [R. 2-9]. On May 2. 1950, after the filing of an opinion, findings of fact, and conclusions of law, the District Court entered judgment for appellee, ordering his unconditional release and the discharge of the writ of habeas corpus [R. 93-94].

This Court has jurisdiction of this appeal from the District Court's judgment under Sections 1291 and 2253 of Title 28 of the United States Code.

Statement of the Case.

Pleadings.

Petition. The appellee Middlebrooks' petition for a writ of habeas corpus alleged that he was held in custody by the State of California by virtue of a warrant of extradition issued by the Governor of California based on a demand for extradition by the State of Georgia [R. 2-3]. The demand was in turn based on Middlebrooks' conviction and sentence in Georgia. The petition alleged that California's detention of Middlebrooks for extradiction was unconstitutional because the conviction on which it was based and which it would enforce had been rendered in violation of the due process of law guaranteed by the Fourteenth Amendment, and because the sentence to which the extradition would again subject Middlebrooks was likewise unconstitutional [R. 3, 4, 7].

In support of these assertions the petition alleged that Middlebrooks had been convicted for the alleged offense of burglary and sentenced to five years in jail, without being given a copy of the charges against him; without any trial whatsoever although he had not pleaded guilty; and without counsel despite his request for a lawyer [R. 3-4]. As to the unconstitutionality of the sentence, the petition alleged that Middlebrooks' sentence inevitably entailed in its performance service in the chain gang under brutal and inhuman conditions, including the constant use of shackles, torture devices as punishment for deficiencies in work, frequent whippings, and a complete lack of sanitation in living quarters [R. 5-6]; service of his sentence under these conditions constituted an imposition of cruel and unusual punishment in violation of the guaranties of the Fourteenth Amendment [R. 4]. The petition also

alleged in detail the pursuit of all the remedies furnished by the State Courts of California to secure relief from California's unconstitutional custody [R. 8].

Return. The return alleged that Middlebrooks was held in custody by virtue of the warrant for extradition of the Governor of California, which was based on a demand by the Governor of Georgia and a copy of the indictment and conviction of Middlebrooks received by the Governor of California from the Governor of Georgia [R. 12-13]. The return by implication admitted the truth of the allegations with respect to Middlebrooks' petitions for habeas corpus to the California State Courts, but alleged a lack of information sufficient to answer the remaining allegations, and contended that the petition failed to state a cause of action [R. 13].

Traverse. It was stipulated and ordered that the petition be also treated as a traverse to the return.

Appearance for State of Georgia. The Attorney General of the State of Georgia, though not appearing personally, was permitted to file a brief as *amicus curiae* herein [R. 41].

Facts.

On the basis of testimony elicited at a hearing, and of exhibits submitted by both parties, the District Court made the following findings of fact, none of which has been challenged by appellant.

Exhaustion of State Remedies—As to the pursuit of State remedies, the District Court found that Middlebrooks had petitioned for habeas corpus to the Courts of California, successively from the lowest to the highest; that he had further unsuccessfully petitioned successively

to the Supreme Court of California and to two justices of the United States Supreme Court for a stay of execution of the warrant of extradition so that he could petition for certiorari to the Supreme Court of the United States from the State judgment denying his habeas corpus petition; that Middlebrooks did not file a petition for certiorari but that it would have been futile for him to do so in the absence of a stay of execution of the warrant because the petition would have been rendered moot by Middlebrooks' extradition; and that there was no remedy available in the Courts of the State of California other than the petitions for a writ of habeas corpus [R. 86-87, Findings 9 and 10; see allegations of present Petition with respect to State petitions for habeas corpus par. 6, R. 8, and admission of truth of allegation in return, par. III, R. 13; as to petitions for stay, see R. 206-212].

Petitioner's Conviction and Sentence. Middlebrooks, a Negro, was indicted in Georgia in 1934 on five counts of burglary which was an offense punishable by a maximum of 20 years in the penitentiary; the indictment was based on acts allegedly committed by Middlebrooks at the age of 14 [R. 83, Finding 3; see indictment, R. 21-27, juvenile case record, R. 126; District Court's discussion, R. 48, note 2; Middlebrooks' testimony, R. 135]. He was then seventeen years of age, with an education only to the third grade of school and unfamiliar with the criminal law [R. 83, Finding 3; see R. 123-129; R. 126, Petr's Ex. 1]. After being held in jail for several months, he was summarily summoned to trial upon fifteen minutes' notice by his jailor [R. 83, 129-134]. He was never given or shown a copy of the indictment; he was not arraigned, nor asked to plead; his request for an attorney was ignored, and he did not have the advice of counsel before

or at any stage of the proceeding [R. 83-84, 134-136; and see statement on indictment that defendant waived arraignment, and waived copy of the bill of indictment and list of witnesses, and see omission of name of counsel, R. 27]. Without the holding of a trial, Middlebrooks' case was disposed of by the judge sentencing him to five years' imprisonment [*Ibid;* and R. 54-55, including note 4; R. 28-39].

Conditions on Chain Gang—Middlebrooks was assigned for service of his sentence to a chain gang where he continuously engaged in painful labor [R. 142-3, 145] under brutal and inhuman conditions [R. 84]. He at all times was forced to wear an iron shackle on each ankle, connected by a heavy chain about 16 inches long [R. 147, 166]. He was housed in a large room with no toilet facilities except for an uncovered and leaking can [R. 140-142]. He was frequently whipped and beaten by guards [R. 145, 158-9] and confined in the stocks and sweat boxes as disciplinary meaures; in the stock Middlebrooks was seated on the narrow edge of a two-by-four board with his wrists and ankles placed through holes in a board in front of him, causing his body to lean forward at a forty-five degree angle. Another two-by-four board was wired across his knees to force his legs to remain straight. When he was removed from the stock he was unable to walk and had to be dragged to the living quarters [R. 85; see R. 151-154]. The sweat box "consisted of a small space three feet wide and six feet long, without light, heat or ventilation. When confined in the sweat box petitioner was deprived of clothing, given two blankets for covering and bread and water for food. Petitioner spent up to seven consecutive days in such a sweat box." [R. 85; see R. 154-157.]

Inseparability of Chain Gang Conditions From Sentence —The above-described conditions were of general application to persons confined upon conviction of felony and consisted of systematic, deliberate and methodical employment of aggravated brutality. These methods and practices were at all times herein material, and are, open, notorious and of long standing. This form of imprisonment and punishment was an integral part of the penal system of the State of Georgia at the time that Middlebrooks was sentenced and at all times that he was confined in the State of Georgia; it is such at the present time. Confinement in a chain gang subject to the conditions set forth above was an inseparable part of the sentence imposed upon Middlebrooks [R. 86, 140-159, 166, 175-7, 180-189, 191-2].

Conclusions of Law and District Court's Opinion in Support Thereof.

Conclusions 1 and 10.

The Court concluded that Middlebrooks had "exhausted all remedies available to him in the courts of the State of California" [R. 88]. While the Supreme Court and this Court have stated that ordinarily State remedies cannot be deemed exhausted until the filing of a petition for certiorari, at the same time they have both made it clear that the petition need not be filed if it is a futility [R. 70-71]. In view of the failure to secure a stay of extradition, a petition for certiorari would have become moot by reason of Middlebrooks' removal from California; under the circumstances, State remedies were exhausted and a petition for habeas corpus to the Federal courts was appropriate without the filing of a petition for certiorari [R. 71, 88-9, 91].

Conclusions 4 and 5.

Middlebrooks' conviction violated the due process of law guaranteed by the Fourteenth Amendment in that it was rendered in the absence either of a plea of guilty or of a trial and finding of guilty [R. 61-62, 89-90]. It was further a violation of due process of law in that he was not afforded the assistance of counsel [R. 89]. The Supreme Court has established that counsel must be afforded when necessary for an adequate defense against a serious charge [R. 58-59]. Here in view of Middlebrooks' youth, and lack of education, and in view of the lack of judicial diligence in protecting his rights, counsel was essential for Middlebrooks' protection [R. 60-61].

Conclusions 6 and 7.

While the Supreme Court has not definitely passed upon the question of whether freedom from cruel and unusual punishment, guaranteed as against the Federal Government by the Eighth Amendment, is guaranteed against State action by the due process clause of the Fourteenth Amendment, a recent opinion clearly indicates that the due process clause should be so interpreted [R. 63-64]. And this interpretation is supported by the basic and fundamental nature of the right to be free from cruel and unusual punishment [R. 65-66]. Accordingly, cruel, unusual, and inhuman punishment is a violation of due process of law [R. 90, Conclusion 6]; and the conditions under which Middlebrooks served his sentence and which were an inseparable part of it constituted such cruel and unusual punishment in violation of due process [R. 90].

CONCLUSIONS 2, 3, 8 AND 9.

California's custody of Middlebrooks for extradition to Georgia is in violation of due process of law, because it is based upon the unconstitutional judgment and sentence against him; such custody is to effectuate the unconstitutional judgment and sentence, thus rendering California an active participant in its enforcement [Concl. 2 and 3, R. 89]. Since the conviction was void and of no legal effect, California can acquire no jurisdiction over Middlebrooks on the basis thereof [Concl. 8 and 9, R. 90-91, 68]. California's custody of Middlebrooks is unconstitutional for the further reason that if Middlebrooks were returned to Georgia he would again be subjected to cruel and unusual punishment [R. 91, 68-69].

While Article IV of the Constitution provides for extradition, it does not require or permit a rendition in violation of the Fourteenth Amendment [R. 69]. And the policy argument that the extradition should proceed without regard to the constitutional questions is based on the unrealistic reasoning that Middlebrooks will have an opportunity to argue these question in Georgia [R. 71-72] and on a disregard of the principle that constitutional rights and liberties must be protected wherever questions in regard to them arise [R. 74]. Since Middlebrooks is in California's custody in violation of the Constitution, the petition for his release must be granted by the courts with jurisdiction in California [R. 76-7].

POINTS TO BE ARGUED AND SUMMARY OF ARGUMENT.

I.

It Was Necessary and Proper for the District Court to Determine Whether California's Custody of Appellee Was Unconstitutional, Because He Had Exhausted His Remedies in the State Courts Without Securing a Full Adjudication of This Issue.

There is no question that Middlebrooks exhausted his remedies in the California courts except for the issue with respect to his failure to file a petition for a writ of certiorari in the United States Supreme Court (App. Br. pp. 74-75). But in *Darr v. Burford,* 339 U. S. 200, the very decision in which the Supreme Court laid down the rule that ordinarily a petition for certiorari must be filed in order to exhaust State remedies, it approved the principle that no futile remedy need be pursued. The District Court's view that the filing of a petition for certiorari would have been futile in the instant case because of the failure to secure a stay, and that State remedies were exhausted without such filing is thus in accord with the Supreme Court's decisions, as well as with the tenor of this Court's opinion in *Morgan v. Horrall* and with the holding on the identical point by the Second Circuit. Since the question at issue in the instant proceeding is the validity of California's custody of Middlebrooks, it is clear that only Middlebrooks' actions in the California courts, and not in the Georgia courts, are relevant to the procedural question of the propriety of resort to the Federal courts in California.

The Constitutional questions considered by the District Court had not been fully adjudicated by the State courts; accordingly, the latter's judgments presented no barrier to the District Court's examination of these issues.

II.

It Was Necessary and Proper for the District Court to Consider and Determine the Constitutionality of the Conviction and Sentence Which Was the Basis for, and Would Be Enforced by, Appellee's Extradition.

The Supreme Court has expressly stated that the scope of inquiry in an extradition case by the courts in the asylum state is flexible and that there are no such rigid and mechanical limits to it, as appellant has depicted. The decisions indicate that the essential validity of the purpose and of the basis for the demand is within the scope of inquiry, and that the appropriateness and feasibility of adjudication in the asylum state of the particular question at issue is the criterion of the scope of inquiry. Under both of these tests, the question of the constitutionality of appellee's conviction and sentence was properly deemed by the District Court to be within its scope of inquiry.

Since none of the Supreme Court extradition decisions are squarely in point in the instant case, because all deal with extradition for the purposes of trial rather than the somewhat dissimilar question of extradition after conviction, Supreme Court doctrines as to the effect to be accorded a judgment under the full faith and credit clause of the Constitution are highly persuasive, if not controlling, authorities in the instant case. It is established beyond question by the Supreme Court decisions that the full faith and credit clause does not require or permit a

judgment which has been rendered in violation of due process to be enforced or effectuated in a sister state. The full faith and credit provision is highly similar in purpose and tenor to the Constitutional provision on extradition; and it follows that the extradition provision does not, any more than the full faith and credit clause, countenance state action on the basis of an unconstitutional judgment of another state. Thus, the fact that Middlebrooks' custody was for extradition did not relieve the Court below upon a petition for habeas corpus, from its usual responsbility of determining upon habeas corpus whether custody is based upon and to enforce an unconstitutional conviction.

The propriety and necessity of the District Court's adjudication herein of the constitutionality of appellee's conviction and sentence is not diminished because of the theoretical possibility that he might some time in the future be able to litigate this question in Georgia. The Court cannot ignore the reality that in view of appellee's poverty, ignorance, background, the immediacy of his incarceration if he were returned to Georgia and lack of representation in his previous trial in Georgia, there is a practical certainty that he would be unable to obtain judicial relief in Georgia because of lack of counsel and inability to represent himself. Even assuming, however, the possibility of a remedy at some indefinite time in Georgia, appellee was faced with the certainty of irreparable injury through detention for at least a substantial period of time if his extradition was not judicially re-

strained, and the determination of whether his detention was constitutional was thus required in the instant proceeding under well-established principles.

The Fourteenth Amendment must be deemed to apply when the State exercises its power to extradite with the same force and effect as it applies to all other exercises of State power. Since State action based upon or to enforce a violation of the Fourteenth Amendment is itself a violation of the Amendment, California's custody of Middlebrooks, based upon and to enforce the Georgia conviction and sentence, was unconstitutional if the conviction and sentence were unconstitutional; consideration of the latter question was thus incumbent upon the Court below.

Of the Circuit Courts which have dealt with the instant problem, the Court of Appeals for the Third Circuit has squarely held in accord with the decision of the District Court herein, and the Court of Appeals for the Second Circuit has indicated its concurrence with this view. While the opinion of the Court of Appeals for the District of Columbia is of contrary tenor, it considered the somewhat dissimilar question of extradition for trial rather than after conviction; and its opinion did not in any event take into account pertinent Supreme Court opinions and important policy considerations.

III.

California's Custody of Middlebrooks for Extradition Was Unconstitutional Because His Conviction and Sentence, Upon Which the Extradition Demand Was Based and Which It Was to Enforce, Violated the Due Process Guarantee of the Fourteenth Amendment.

Even accepting the statements noted on Middlebrooks' Georgia indictment at their face value, and without regard to the District Court's findings as to their partial inaccuracy, it is clear that his conviction contravened due process. For the indictment states that Middlebrooks "waived" notification of the charges against him, and also shows that he was not afforded counsel. No waiver by a person of Middlebrooks' ignorance, acting without the advice of counsel or of any experienced person, is effectual to relieve the State of its duty of affording basic procedural protection to the accused. And in view of Middlebrooks' circumstances, combined with the complete failure of the convicting judge to protect Middlebrooks' rights, it was a violation of due process to fail to afford him counsel. Further, the District Court's findings that not even the regularity of procedure indicated by the indictment was in fact afforded Middlebrooks are well supported; and he was thus denied any semblance of due process.

The protection afforded by the Fourteenth Amendment must be deemed to include the prohibition against cruel and unusual punishment established by the Eighth Amendment. The conditions on the chain gang, on which Middlebrooks served his sentence, as the District Court found, showed a systematic brutality which constituted cruel and unusual punishment. The imposition of these conditions was an inseparable part of his sentence and is inevitable in the event Middlebrooks is returned to Georgia.

Thus, California's custody of Middlebrooks for extradition is not only based on an unconstitutional conviction and sentence, but California's custody is the *sine qua non* for Georgia's further enforcement of it. Such aid in the affectuation of an unconstitutional conviction and sentence is itself unconstitutional, and the District Court was therefore correct, under its power to grant release from an unconstitutional custody, to order Middlebrooks' release.

IV.

It Was Necessary and Proper for the District Court to Determine Whether California's Custody of Appellee Was Unconstitutional Because He Had Exhausted His Remedies in the State Courts Without Securing a Full Adjudication of This Issue.

A. Exhaustion of State Remedies.

It is clear, as the District Court concluded [R. 88], that appellee had, prior to petitioning the District Court, "exhausted all remedies available to him in the courts of the State of California" to secure his release from custody [see also R. 87, Finding 10]. He had in turn petitioned for habeas corpus to secure the relief herein sought, in the Superior Court of California, the District Court of Appeal, and the Supreme Court of the State, which were the only state courts with jurisdiction to receive such a petition; habeas corpus was the only State method by which Middlebrooks could attempt to secure his release from custody and each of his petitions was denied [R. 86-87].[1] In order to have an opportunity to petition for

[1]The successive applications are necessary to exhaust state remedies. In cases of this kind in California an appeal does not lie to review a lower court decision denying the writ (Cal. Penal Code, Sec. 1506; *Loustchat v. Superior Court,* 30 Cal. 2d 905).

certiorari to the Supreme Court of the United States, appellee then applied for a stay of execution to the Supreme Court of California; after its denial, he in turn applied for a stay to two United States Supreme Court Justices: to the surpervising Justice for this Circuit, Mr. Justice Douglas, and to Mr. Justice Black [R. 87]. When all stays were refused, he commenced the instant action.

The District Court found that, in the absence of a stay, "it would have been futile for petitioner to have applied to the United States Supreme Court for a writ of certiorari because . . . petitioner would have been transported to Georgia and his petition to the United States Supreme Court would have become moot" [R. 87]; hence, the District Court concluded that state remedies had been exhausted without the filing of the petition for certiorari [Concl. of Law 1 and 10, R. 88-9, 91].

The appellant does not dispute the District Court's findings; and his only argument against its conclusions is his citation of *Darr v. Burford,* 339 U. S. 200, in which the Supreme Court declared that certiorari must ordinarily be sought from a State Court judgment before resort to the Federal District Court. However, in that very opinion the Court reiterated the principle, from which it has never shown any deviation, that certiorari, like other remedies, need not be sought, if it would be a futile gesture (see 339 U. S. at p. 209). And see *White v. Ragen,* 324 U. S. 760, 765, cited with approval in the *Burford* opinion, where the Supreme Court held that State remedies were exhausted without a petition for certiorari because it appeared that such a petition would have been futile. There can be no doubt of the futility of a petition for certiorari in the instant case in view of the fail-

ure to secure a stay; thus, as this Court indicated in *Morgan v. Horrall,* 175 F. 2d 404 (1949), with appellee's unsuccessful applications for a stay, he exhausted his remedies under State law.[2] The precise point was ruled upon by the Second Circuit in a highly similar extradition case, in which it held that the Federal District Court properly assumed jurisdiction over the petition for habeas corpus, saying:

> "We think the refusal of the stay as described completed the exhaustion of state remedies because, unless a stay was granted by someone having authority to grant it the relator would certainly have been returned to Georgia and his case would have become moot so far as New York State was concerned." (*Jackson v. Ruthazer,* 181 F. 2d 588, 589 (1950), cert. den. 70 S. Ct. 1027.)

B. Failure of State Courts to Render Full Adjudication of Constitutional Questions.

Since there was no opportunity for Middlebrooks to petition for certiorari to the United States Supreme Court from the State Court judgment, there was no completion of the adjudicatory process commenced in the State courts and examination by the District Court of the Federal questions was undoubtedly necessary. As pointed out in *Ex parte Hawk,* 321 U. S. 114, 117 [quoted by the District Court, R. 75], it is only after a full adjudication by the State courts and either review or a refusal to review by the Supreme Court that a Federal Court may refuse to reexamine "the questions thus adjudicated."

---

[2]In the *Morgan* case, the holding was that State remedies had not been exhausted since the prisoner had made no attempt to secure a stay in order to enable him to petition for certiorari.

In addition to this independent and sufficient ground for the District Court's examination of Middlebrooks' constitutional contentions, the State courts' judgments do not diminish the necessity for adjudication by the District Court because of the nature of their deliberations. No opinion was delivered either orally or in writing by any of the State courts in denying the petitions for habeas corpus. Thus there is no possibility of a clear showing that the State courts thoroughly examined, or even considered, the appellee's constitutional contentions, and only a certainty that they did so would justify a Federal Court's refusal to determine whether appellee's custody violates the Constitution (see *Ex parte Adamson,* 167 F. 2d 996). But even if a Federal Court could deny a remedy for a violation of constitutional right merely on the basis of conjecture as to the State courts' actions, the most favorable conjecture possible in the instant case is that a full consideration of the unconstitutionality of appellee's detention was accorded by the lowest California Court, the Superior Court for the County of Santa Barbara, which alone accorded a hearing [R. 86]. Assuming the upper courts gave any consideration to the Federal questions, they could not have done more than to determine that the Constitution dictated the limited scope of inquiry in extradition proceedings for which appellants have at all times contended [R. 211]; for in both of the upper courts the petition was denied without a hearing [R. 87. Finding 9], which would have been essential in order for the Court to pass upon the appellee's contentions as to the unconstitutionality of his Georgia conviction and sentence.

Thus, assuming most favorable conjecture as to the California Court's actions, the upper State courts deter-

mined a preliminary Federal Constitutional question of an important and controversial nature in such a way as to foreclose their consideration of the other constitutional issues involved. In this situation, even aside from the fact that the circumstances precluded the possibility of review by the United States Supreme Court of the correctness of the preliminary determination, the District Court would have been remiss in its functions if it had refused appellee access to the Federal courts for consideration of his constitutional contentions. At most, the rule that the Federal courts will not re-examine questions determined by the State courts applies only under *ordinary* circumstances. [See *Ex parte Hawk,* 321 U. S. 114, 117, quoted by the District Court, R. 75, 76.] And this policy applies, primarily, to questions of State law and to questions of fact, or to mixed questions of law and fact. See *Morgan v. Horrall,* 175 F. 2d 404, 407 (1949), in which this Court pointed out that "a clear and convincing showing of a violation of . . . rights under the Federal Constitution" required an exception to the policy of refusing to disturb a State Court adjudication. In any event, as stated in the *Hawk* case, "where resort to state court remedies has failed to afford a *full* and fair adjudication of the federal contentions raised . . . a federal court should entertain the petition for habeas corpus, else he would be remediless." (321 U. S. at p. 118, italics added.) The examination by the State courts of the constitutional questions, was not taken in its best light, "full."

The Second Circuit, in *Jackson v. Ruthazer, supra,* clearly indicated that the State courts' determination of the preliminary issue of scope of inquiry was not a sufficient examination of the issues to deter their full adjudication by a Federal Court. There the Court held that it need not re-examine the issues because the New York State courts had held a hearing on the merits of the fugitive's constitutional objections and had determined that his punishment in Georgia was not in fact "cruel and unusual" (181 F. 2d at p. 589); it is indubitable from the opinion that if the State courts had decided the scope of inquiry question adversely and had not decided all the issues on the merits, the Second Circuit would have deemed it necessary and proper for the Federal courts to examine the constitutional issue. (Compare *Rose v. Mangano,* 111 F. 2d 114 (C. A. 2d 1940).)

* * * * * * * * *

The issue of whether the District Court's judgment was correct from the standpoint of the exhaustion of State remedies in no way involves the Georgia courts; the custody to which the District Court's writ was directed was that by the State of California, and the only State courts which could have released appellee from it were the California courts. The role of the Georgia courts is pertinent only to the question of the propriety of the consideration of the constitutionality of appellee's conviction by any of the courts in the place of asylum, and will be considered in that connection below.

V.

It Was Necessary and Proper for the District Court to Consider and Determine the Constitutionality of the Conviction and Sentence Which Was the Basis for, and Would Be Enforced by, Appellee's Extradition.

The District Court's judgment is based on the position, which will be argued in Point III, that Middlebrooks' detention by California for extradition was unconstitutional because the conviction and sentence upon which the extradition was based and which it would enforce was unconstitutional. Appellant's only argument against the District Court's judgment is his view that the constitutional provision on extradition, as interpreted by the Supreme Court, precludes consideration of the constitutionality of the conviction and sentence even though they were the basis for the extradition demand and were being enforced through Middlebrooks' custody for extradition. We shall show that while the Supreme Court has never had occasion to rule upon the precise question here in issue, its decisions on extradition, including all those cited by appellant, support the District Court's position as to the necessary scope of its inquiry. Since, however, the Supreme Court extradition decisions are not squarely in point in the case at bar, we shall demonstrate that the District Court's approach is dictated by other pertinent principles as to constitutional rights and remedies; further, we shall show that of the three Circuit courts which have dealt with various aspects of the instant problem, the clear weight of opinion of the Circuit judges is in accord with the District Court.

A. The Supreme Court's Extradition Decisions Show the Propriety of the District Court's Consideration of the Constitutionality of Appellee's Conviction and Sentence.

The extradition clause of the Constitution (Art. IV, Sec. 2, Clause 2) only governs the return of a "person charged in any State with . . . crime" to "the State having jurisdiction of the crime" for trial.

It is clear from the phraseology of this provision that the draftsmen were concerned only with the extradition of fugitives in order to secure their presence for trial, and the Supreme Court has repeatedly stressed the rendition of fugitives for trial as the purpose of the constitutional authorization.[3] Thus, the policy as to scope of inquiry embodied in this provision was directed solely at the case of extradition before trial, and is pertinent in the instant case of extradition after conviction only insofar as dictated by resemblances in the two types of cases.[4] Simi-

---

[3]See *Lascelles v. Georgia,* 148 U. S. 537, 542; *Appleyard v. Massachusetts,* 203 U. S. 222, 227.

[4]The fact that extradition after conviction has sometimes been assumed to fall technically within the category of an extradition based on a charge does not alter the fact that the purpose of such an extradition is something other than trial of the fugitive and that the policy of the section was not formulated with a view to such an extradition. The purpose of this technicality was so that the extradition might be considered within the authority to extradite conferred by Article IV. See *Reed v. Colpoys,* 99 F. 2d 396 (App. D. C. 1938); but compare *Breuer v. Goff,* 138 F. 2d 710 (C. A. 10th, 1943). An argument that extradition after conviction was not authorized by the constitutional provision does not seem to have ever been advanced. Since passage of the Federal Act giving the permission necessary under Art. I, Sec. 10, par. 3 for the States to enter into fuller extradition compacts, it is no longer necessary to support extradition after conviction by this artificial reasoning. In the instant case Georgia has stated that the purpose of the extradition is to again confine Middlebrooks to complete service of his sentence [R. 19]: thus, whether or not the extradition is viewed as technically based on the indictment, it is clear that its purpose is not the securing of a fugitive for trial.

larly, the Supreme Court decisions all deal with the problem of rendition of fugitives for trial.

The problem of extradition of fugitives after conviction is obviously of a far different scope from extradition for purposes of trial; fugitives after conviction are numbered by those few who contrive to escape, whereas in the absence of extradition for purposes of trial all criminals could find refuge by merely crossing state lines after their criminal acts. And the problem of inquiry by the asylum court in the two cases likewise has marked differences. But aside from the sound grounds for distinction with respect to this question between the case of extradition after conviction and extradition for purposes of trial (discussed *infra*), we submit that a complete reading of the Supreme Court decisions, rather than a mere culling of general language therefrom as in appellant's brief, indicates the propriety even in the latter type of case of consideration by the courts in the asylum state of the constitutionality of the conduct on which the extradition demand is predicated.

Marbles v. Creecy, 215 U. S. 63, appears to be the only Supreme Court case in which any question was presented as to the unconstitutionality of the purpose and result of the extradition, which is the issue at bar. There the Supreme Court said that since the allegations that the extradition would not be followed by a fair trial were not supported, it could only assume that the object of the extradition was the holding of a fair trial (215 U. S. at pp. 69-70). The Court did *not* rule the question of the object of the extradition to be outside of the scope of inquiry, as appellant has argued herein. Rather, its language indicated that if there were evidence to support

allegations as to the prospective unconstitutional result of the extradition, the courts in the asylum state would be required to determine their truth, and to order the fugitive's release from custody if the result of the extradition would be unconstitutional;[5] thus, the *Marbles* case clearly supports the District Court's decision in the case at bar.

While none of the other Supreme Court decisions bear as directly on the instant case, they are significant like the *Marbles* case in showing that there are no rigid and mechanical limits to the scope of the inquiry by the courts in the asylum state, such as appellant pictures. Indeed, the scope of extradition hearings, the Court declared, "has not, perhaps should not be, determined with precision" (*Biddinger v. Commissioner,* 245 U. S. 128 at p. 134.)

But that the essential validity of the basis for the demand must be deemed within the scope of the inquiry in the asylum state is indicated by several decisions. Thus, the Supreme Court has repeatedly held that the courts in the asylum state must determine whether the "detention [for extradition] was in violation of the Constitution" and that to establish that the custody was constitutional, it "must appear . . . that the person demanded is *substantially* charged with a crime . . . (This) is a question of law, and is always open . . . on an application for a discharge under a writ of habeas corpus." (Italics added.) (*Appleyard v. Massachusetts,* 203 U. S.

---

[5]See *Commissioner ex rel. Mattex v. Superintendent of City Prison,* 152 Pa. Super. 167, 31 A. 2d 576 (1943), where the Court, relying on the *Marbles* case, ordered a release from custody for extradition upon the showing that the fugitive was likely to be lynched if extradited and thus the holding of a trial would be prevented.

222, 226, 228. *Semble, McNichols v. Pease,* 207 U. S. 100, 107, 108.) The Court has not explicitly defined the meaning of its phrase "substantially" charged with crime, which has been repeated from case to case; but it seems clear from the *Appleyard* opinion that the "question of law" which "is always open" is whether there is a minimum valid basis for the charge on which the extradition demand is predicated, so that it is reasonable to subject the fugitive to the extradition. Since only a *charge* of crime was involved, a *substantial* charge would satisfy the criterion of reasonableness.

In application of this principle in *Drew v. Thaw,* 235 U. S. 432, the Court considered in detail whether the legal theory of the indictment was tenable, and held that Thaw's custody for extradition was valid, only because there was "here a reasonable possibility it (the act charged) may be a crime" (235 U. S. at p. 440). Thus, the Court determined whether there was a minimum valid basis for the demand and for the fugitive's subjection to trial: the process for which he was being extradited;[6] analogizing to the instant situation, inquiry would be required as to whether there is a constitutional basis for Middle-

---

[6]It is to be noted that the authority of the above-discussed cases is not opposed by any in which the Court has refused to consider the validity of the charge upon which the extradition demand was based.

In *Pearce v. Texas,* 155 U. S. 311, the Court refused to consider the constitutionality of the statute which established the offense the fugitive was charged with committing. Obviously, however, the possible unconstitutionality of the statute would not render it unconstitutional to charge the fugitive with the crime or try him for it. Thus, the *Pearce* case is not contrary to the argument in the text that the constitutionality of the basis for the demand—whether a charge or a conviction,—and of the result of the extradition are to be considered.

brooks' conviction and sentence and for the confinement the demanding State intends to impose.

Likewise, of great pertinence in demonstrating the correctness of the District Court's decision herein, is the principle embodied in these opinions that the criterion for determining whether a question is within the scope of inquiry is the appropriateness under all the circumstances of its adjudication in the asylum State. Thus, in the *Biddinger* case, in holding that the effect of the Statute of Limitations is not a question requiring adjudication in the asylum State, the Court pointed out the flexibility of the scope of inquiry (see *supra,* p. 23) and rested its holding on the reasoning that the particular defense of limitations is one that "must be asserted on the trial by the defendant in criminal cases; and the form of the statute of Illinois . . . makes it especially necessary that the claimed defense of it should be heard and decided by the courts of that State." (245 U. S. at p. 135.) Similarly, in *Drew v. Thaw, supra,* the Court's conclusion rested on the grounds that, there being "a reasonable possibility" the indictment stated an offense (discussed *supra,* p. 24), the courts in the State of asylum should not determine definitively whether or not the fugitive's defense of insanity was valid, because this defense under the circumstances posed a complicated question of law and fact which probably had to be determined on the basis of a trial or at least on the basis of the law of the demanding State.

We submit that the Supreme Court's language as to the limitations of the extradition inquiry related solely to the inappropriateness of determination by the courts of the asylum State of defenses connected with the trial of

the charge, which was the issue in all the cases to come before it. While the Supreme Court decisions thus fail to support appellant's position, several points supporting the District Court's decision are clear from the opinions:

(1) The one opinion of the Court which concerns the possible unconstitutionality of the process to which the demanding State will subject the fugitive as the result of the extradition, clearly indicates that such an unconstitutional result is within the scope of inquiry in the asylum State and that the fugitive should be released from custody if the result of extradition would be an unconstitutional act in the demanding State (*Marbles v. Creecy, supra*).

(2) While none of the other opinions concern the constitutionality of the basis or result of the demand, they indicate that the essential validity of the basis and result is within the scope of inqury: in a case such as the instant one where the demand is predicated on a conviction and sentence, this principle would necessitate examination of their constitutionality (*Appleyard v. Massachusetts, supra*).

(3) The appropriateness under all the circumstances of adjudication in the asylum state of the particular question at issue is the criterion of the scope of inquiry (*Biddinger v. Commissioner, Drew v. Thaw, supra*). As we shall show in Point C, consideration in the asylum State of the constitutionality of the conviction and sentence was highly appropriate in the instant case.

(4) The Constitutional provision on extradition has not been construed as setting definitive and rigid limits to the scope of inquiry in the asylum state, even in the case of

extradition for the purpose of trial, which is the type of extradition at which the Constitutional provision was directed. *A fortiori,* it does not indicate such limitations for the case of extradition after conviction, in which, as we shall show in Point C, rigid limits are even less appropriate than in the case of extradition for trial. Accordingly, consideration of general principles pertinent to the scope of a habeas corpus inquiry is warranted in determining the correctness of the District Court's judgment herein. These principles, considered in Point C, establish the propriety of the District Court's consideration of the constitutionality of Middlebrooks' conviction and sentence.

(5) The constitutional provision on extradition has not been construed as rigidly compelling extradition under any and all circumstances, and it is only this extreme view as to the compulsive nature of the clause which would lend support to appellant's position. Absent such support, it is indubitable as we shall show in Point D that the State is limited in the exercise of its power to extradite, as in the case of all its other powers, by the Fourteenth Amendment. And because it is a violation of the Fourteenth Amendment to aid in the enforcement of a conviction rendered in violation of the Amendment, California's custody of Middlebrooks for extradition was a violation of the Amendment.[7] Accordingly, to determine the constitutionality of California's custody, the District Court's scope of inquiry necessarily included the constitutionality of Middlebrooks' conviction and sentence.

(6) None of the Supreme Court decisions are squarely in point in the case at bar, since none of them concern an extradition to enforce a judgment of conviction and

[7]See Point III, *infra.*

sentence, which is in some respects a dissimilar problem from that of extradition for purposes of trial. We believe that the Supreme Court's decisions as to the effect to be accorded under the full faith and credit clause to judgments of a sister state are of controlling authority herein, as will be shown in Point B.

B. The Supreme Court's Construction of the Full Faith and Credit Clause of the Constitution Clearly Establishes the Propriety of the District Court's Consideration of the Constitutionality of Appellee's Conviction and Sentence.

It is established beyond question that in applying the full faith and credit clause of the Constitution the courts must consider whether the judgment of another state which they are asked to enforce was rendered in violation of due process, and that it must be refused enforcement if it was so rendered (see cases discussed *infra*). We submit that these decisions are of controlling authority with respect to the proper procedure in extradition. For the full faith and credit clause is like the extradition provision, set forth in Article IV of the Constitution; and it is couched in equally mandatory terms, the full faith and credit provision reading: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State" (Constitution, Art. IV, Sec. 1). And the purpose and significance of the two provisions are highly similar. Thus, the Supreme Court's reiterated opinion that the " 'very purpose' of Article IV, section 1 was 'to alter the status of the several states as independent foreign sovereignties . . . and to make them integral parts of a single nation' "[8] is strik-

---

[8]*Williams v. North Carolina,* 317 U. S. 287, 295; see also *Broderick v. Rosner,* 294 U. S. 629, 642-643; *Magnolia Petroleum Co. v. Hunt,* 320 U. S. 430, 439.

ingly comparable to its opinion on the function of extradition (see quotations in appellant's brief pp. 30, 33, and opinion by District of Columbia Court of Appeals in *Johnson v. Matthews,* set forth in appellant's brief in appendix pp. 8-9).

Despite the command of the full faith and credit clause, the Supreme Court has never deviated from the principle that it is only "when a court of one state (is) acting in accord with the requirements of procedural due process" that its judgment is to be credited in sister states (*Williams v. North Carolina,* 317 U. S. at p. 303). "The duty of a state to respect the judgment of a sister state arises only where such judgments meet the tests of justice and fair dealing that are embodied in the historic phrase 'due process of law.'" (Justice Frankfurter concurring in the *Williams* case, 317 U. S. at p. 306.) Semble:

Griffin v. Griffin, 327 U. S. 220, 228.

Not only *may* the sister state consider the question of whether the judgment contravened due process, but, the due process clause *compels* such consideration. For "due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process" (*Griffin v. Griffin,* 327 U. S. at page 229). Indeed, the conclusion that a judgment lacking due process cannot be given effect, despite the full faith and credit clause, is dictated by several doctrines the Court has developed with respect to this clause. For the judgment of a sister state is always open to attack on the basis of a want of jurisdiction in the court rendering it;[9]

---

[9]See *Hansberry v. Lee,* 311 U. S. 32; *Adam v. Saenger,* 303 U. S. 59; *Treinies v. Sunshine Mining Co.,* 308 U. S. 66, 78.

and since a violation of constitutionally guaranteed procedures results in a complete lack of jurisdiction and a void judgment,[10] the due process question must be reviewed in a sister state. Further, since a judgment lacking due process cannot be given effect in the state in which it is rendered, it likewise cannot be given effect in a sister state. As the Court has pointed out: "A rigid and literal enforcement of the full faith and credit clause . . . would lead to the absurd result that . . . the statute of each state must be enforced in the courts of the other, but cannot be in its own." *Alaska Packers Association v. Commission,* 294 U. S. 532, 547. See *Halvey v. Halvey,* 330 U. S. 610; *Morris v. Jones,* 329 U. S. 545; and *Roche v. McDonald,* 275 U. S. 449, as to the unenforceability in a sister state of a judgment unenforceable in the state of origin.

We believe that these decisions are controlling in the instant case, and that they show that the District Court's consideration of the constitutionality of Middlebrooks' conviction and sentence was not only proper but unavoidable. To sum up these cases in their application to the case at bar: if the Georgia judgment which the extradition would enforce and effectuate, was rendered in violation of due process, it would be a violation of due process to enforce it, and its enforcement by extradition would be invalid in that the judgment would thereby be effectuated although it could not have been effectuated in Georgia. The extradition clause of the Constitution cannot be interpreted to override and negate the doctrines of the above-discussed cases, which reflect the sweeping

---

[10] *Johnson v. Zerbst,* 304 U. S. 458, 468; *Smith v. O'Grady,* 312 U. S. 332, 334.

force of the due process clause and the basic nature of the judicial process, any more than has the full faith and credit clause; particularly must this be true since the full faith and credit clause in terms commands credit to judgments of a sister state and the extradition provision, as already noted, applies in the case of an extradition to enforce a judgment only by analogy.

Thus, the fact that appellee was being held for extradition did not obliterate the District Court's usual duty upon habeas corpus of ordering the release of a prisoner held in custody on the basis of an unconstitutional and void conviction;[11] indeed, it would have been a violation of due process to permit the continuance of Middlebrooks' custody if it was so based. It was as much a judicial duty for the courts in California to order Middlebrooks' release from California's custody as it would have been for the Georgia courts to order his release from his custody in Georgia pursuant to the void conviction. It was therefore incumbent upon the District Court to consider whether the Georgia conviction was rendered in violation of due process. Since it was entirely void if it was so rendered, it was subject to collateral attack in any and every proceeding in which it was brought in issue.[12]

---

[11] *Smith v. O'Grady; Johnson v. Zerbst,* loc. cit. *supra,* note 10.

[12] When the court "acts without authority, its judgments and orders are regarded as nullities, they are simply void. They constitute no justification; and all persons concerned in executing such judgments or sentences, are considered, in law, as trespassers." (*Eliott v. Peirsol,* 1 Pet. (26 U. S.), 328, 340.) If a "court is without jurisdiction . . . its proceedings are null and void even in a collateral proceeding." (*Hamilton v. Brown,* 161 U. S. 256, 267.) Of the numerous decisions asserting this principle, see also *Windsor v. McVeigh,* 93 U. S. 274; *United States v. Walker,* 109 U. S. 258; *McDonald v. Mabee,* 243 U. S. 90, 92.)

This principle is especially applicable when, as we shall show in Point III is the case herein, the invalidity of the judgment is apparent on the fact of the record.

C. It Was Feasible and Appropriate for the District Court to Adjudicate the Constitutionality of Middlebrooks' Conviction and Sentence; and This Adjudication Was Required by the Principles Pertaining to the Availability of Judicial Relief.

The appropriateness and feasibility of determining the question of the constitutionality of the conviction and sentence in the asylum state is pointed up by contrast with the situation in the case of questions arising in connection with the trial. As Mr. Justice Holmes noted in holding that the latter type of questions should not be examined in the asylum state, the Constitution itself provides for trial only in the state wherein the crime was allegedly committed (*Drew v. Thaw*, 235 U. S. at p. 4490). Questions arising in and connected with the trial therefore are not only inappropriate but impossible for the courts in the asylum state to determine efficaciously. In distinction to this situation, there is no constitutional obstacle to determination by the courts of the asylum state of the constitutionality of the conviction and sentence.

Furthermore, from the standpoint of availability of remedies, consideration of the constitutionality of the conviction and sentence is a far different question from consideration before trial of possible defenses. In none of the Supreme Court cases, all dealing with extradition before trial, was there any question as to the fugitive's practical or theoretical inability to secure an adjudication in the demanding state of the issues he was attempting to present in the asylum state. But the Court's reasoning that certain issues should not be examined in the asylum state because they could be determined better in the demanding state, assumes the certainty of an opportunity to secure a determination in the latter and shows that lack

of opportunity to present an issue in the demanding state must be deemed a significant factor in setting the scope of the asylum court's inquiry. While in the usual case of a fugitive before trial, as in the Supreme Court cases, there would be no question as to the fugitive's opportunity to present his defenses upon his trial after extradition, contrariwise, in the typical case of a fugitive's attack in the asylum state on the constitutionality of his conviction and sentence, and certainly in Middlebrooks' case, he would not have an opportunity to make this attack in the demanding state.

In the instant case the Court found it was "extremely remote" [R. 72] that Middlebrooks would be able to secure consideration of his constitutional objections if returned to Georgia; and we believe it is substantially certain that he would be unable to do so. This conclusion is clear without in any way impugning the judicial processes in Georgia. In view of Middlebrooks' lack of education and experience, and his immediate incarceration on his return to Georgia so that he would be deprived of the possibility of helpful contacts, he would certainly be unable to effectively present a petition for review of his conviction without counsel; it is hardly conceivable that he would even know the name of the court in which such a petition should be filed, or its location. And in view of his financial and social status, his lack of representation in his previous trial, and the fact that he would be immediately incarcerated on his return to Georgia, it can hardly be supposed he could obtain counsel. See *Smith v. O'Grady*, 312 U. S. 332, 334, where the Court points out as grounds for examination on habeas corpus of the constitutionality of a conviction, the allegations that the petitioner "had been rushed to the penitentiary where his ignorance, confine-

ment and poverty had precluded the possibility of securing counsel" to appeal from his conviction, and that he had been trying for eight years to secure review of its validity. Such a realistic lack of opportunity to secure a remedy in the demanding state would be typical in the case of a fugitive contesting extradition on the basis of the unconstitutionality of his conviction; it would be highly probable that he chose escape before attempting to present his constitutional objections because of his inability to do the latter in the demanding state. The Court cannot ignore the realities as to the availability of remedies; the whole problem of remedies as well as of the need for counsel is, and is uniformly treated as, essentially a pragmatic one.[13]

1. The Theoretical Possibility That Appellee Would Be Able to Litigate in Georgia the Constitutionality of His Conviction and Sentence Did Not Relieve the District Court of the Duty of Adjudicating This Issue in the Instant Proceeding.

Appellant stresses the view that the constitutionality of Middlebrooks' conviction and sentence would be open for consideration in Georgia if it were ignored in California and his extradition were permitted (Brief pp. 68-74). While a court may refuse to consider the constitutional basis for a detention because it has already been adjudicated (see *supra*, p. 19), it would be a wholly novel doctrine that the question of the constitutional basis for a detention may be ignored because it might receive the attention of some other court sometime in the future.

---

[13]For examples of the numerous cases illustrating this approach, see *Young v. Ragen*, 337 U. S. 235; *King v. Order of United Commercial Travelers*, 333 U. S. 153; *White v. Ragen*, 324 U. S. 760, 765; *Haley v. Ohio*, 332 U. S. 596.

As the District Court pointed out [R. 74]:

> "If constitutional rights and basic liberties are to be protected, they must be protected in the courts where the questions arise and when the questions arise, and the shunting of a case from one court to another should as far as possible, be avoided."

Particularly must this principal be observed where the petitioner for the adjudication is restrained of his liberty; the writ of habeas corpus is to be used to "deal effectively with any and all forms of illegal restraint" (*Price v. Johnston,* 334 U. S. 266).

Furthermore, consideration of whether Middlebrooks' conviction has a constitutional and valid basis is dictated by the established doctrine that an adjudication must be accorded when there is a clear likelihood of irreparable injury from a postponement of consideration. It was incumbent upon the District Court to adjudicate Middlebrooks' contentions because of the certainty of his injury in the form of detention in California and imprisonment in Georgia for a substantial period of time, even if it were assumed, contrary to our argument above, that he could there eventually seek a remedy; his injury would obviously be irreparable and illegal if his detention were without a valid basis. Compare *Utah Fuel Co. v. National Bituminous Coal Co.,* 306 U. S. 56, and *Smith v. Illinois Bell Telephone Co.,* 270 U. S. 587, where the validity of proposed administrative action was determined in injunction proceedings, and the administrative proceedings were enjoined, despite the doctrine of exhaustion of administrative remedies and the certainty in these cases of the opportunity for a subsequent remedy, because of the likelihood of irreparable injury if the petitioner were forced to undergo the administrative procedure and subsequently

seek relief.[14] The instant situation is also closely analogous to that where the constitutionality of a criminal statute is determined in a suit to enjoin its enforcement because of the risk of irreparable injury if such determination is postponed until a criminal prosecution.[15] And where the possibility of another judicial examination of the alleged violation of constitutional rights is in fact as remote as in the instant case, a refusal to consider it in the instant proceeding would tend to be a denial of due process in that such a refusal would in effect constitute a deprivation of all remedy for the violation. Compare *Mooney v. Holohan,* 294 U. S. 163, 170; *Taylor v. Alabama,* 335 U. S. 252.

As against the foregoing principles which we believe made consideration of the constitutionality of the Georgia conviction and sentence mandatory, we do not believe views of policy, such as those expressed by the Court of Appeals for the District of Columbia[16] can be given any

---

[14]See also *Great No. Ry. v. Merchants Elev. Co.,* 259 U. S. 285; *Pennsylvania v. West Virginia,* 262 U. S. 553, 592-595; *Euclid v. Ambler Realty Co.,* 272 U. S. 365, 368, and *Oklahoma Natural Gas Co. v. Russell,* 261 U. S. 290, 293.

[15]For examples of the numerous cases so holding, see *Packard v. Banton,* 264 U. S. 140; *Terrace v. Thompson,* 263 U. S. 197; *Ex parte Young,* 209 U. S. 123; *Dobbins v. Los Angeles,* 195 U. S. 223.

[16]The District of Columbia court's assumption that the court in the asylum state would necessarily free the fugitive if it considered the constitutional questions thus seems to be ill-taken. And its argument that a state such as Georgia might welcome the escape of its prisoners to other states is somewhat puzzling, considering Georgia's attempts to extradite escaped fugitives; the court's suggestion that these attempts may merely be *pro forma* compliance with a constitutional duty seems without merit, for the Constitution imposes no duty to demand extradition. As to the Georgia officials' difficulty, suggested by the District of Columbia court, in presenting evidence to contest the fugitive's allegations, the District Court herein suggested that this could be done by affidavit [R. 53, note 3].

weight. However, it is to be noted that consideration of the constitutionality of the conviction in the asylum state will not inevitably lead to the liberation of fugitives, as that Court of Appeals feared. On the contrary, in a recent New York case, after hearing testimony by Georgia officials as to the prison system in a particular Georgia county the New York court concluded that the fugitive had not been sentenced to cruel and unusual punishment and refused to order his release on habeas corpus. See *Jackson v. Ruthazer,* 181 F. 2d 599 (C. A. 1950); cert. den. 70 S. Ct. 1027.[17]

D. Appellant's Argument as to the Scope of Inquiry Cannot Be Accepted Because It Would Require Excepting the Power to Extradite From the Doctrine That All State Action Is Limited by the Fourteenth Amendment.

As we have already argued in part and will further demonstrate in Point III, State action on the basis of and to aid in the enforcement of a conviction rendered in violation of the Fourteenth Amendment, is likewise a violation of the Amendment. And the Fourteenth Amendment applies with equal force to all State acts and powers; it must be deemed applicable when the State action consists of extradition, just as it is in the case of any other State action.

That the power to extradite is limited by the Fourteenth Amendment is the only conclusion possible in the light of the cases dealing with the full faith and credit clause section of the Constitution. Although that section, which is highly analogous to the extradition section, unequivocally commands the States to give full faith and credit to judgments rendered in other States, the power and

[17]In *Johnson v. Mathews,* 182 F. 2d 677 (1950).

authority to enforce such a judgment is limited by the Fourteenth Amendment. (See fuller discussion, Point B, *supra.*) For it is fundamental in the structure of the Constitution that none of its provisions grant the power to act in violation of the guarantees embodied in the Amendments. Thus, the Supreme Court has repeatedly rejected the argument that even the war power, despite its special nature and the emergencies that evoke its exercise, is removed from the impact of the due process clause.[18]

In extradition the State exercises its inherent police power with authorization, necessitated by the Constitutional prohibition of interstate compacts without Congressional consent,[19] derived either from Article IV or Federal statute (see note 4, *supra*). Viewing extradition from either aspect, there is no basis for concluding that this power, alone among the powers of government, may be exercised free from the Constitutional prohibitions.

The only answer to this position which has been suggested is that of the Court of Appeals for the District of Columbia, that extradition is merely "procedural," and that for this reason custody for extradition purposes could not be deemed to conflict with the Fourteenth Amendment. But whether or not the use of the coercive powers of the State of California violates the Constitution cannot be determined by labeling its act procedural; thus, in *Shelley v. Kraemer,* 334 U. S. 1, the Supreme Court had no doubt that the State violated the Fourteenth Amendment though its act consisted merely in the issuance of an injunction.

---

[18]See *Hirabdyashi v. United States,* 320 U. S. 81, 100; *Ex parte Milligan,* 4 Wall. 2, 21; *Hamilton v. Kentucky Distilleries Co.,* 251 U. S. 146, 156; *Howe Building & Loan Association v. Blaisdell,* 290 U. S. 398, 426; *United States v. Cohen Grocery Co.,* 255 U. S. 81.

[19]Constitution, Art. I, sec. 10, par. 3.

Accordingly, the limitations of the Fourteenth Amendment apply to California's exercise of its power to extradite, and insofar as the constitutionality under the Fourteenth Amendment of Middlebrooks' extradition depends upon the constitutionality thereunder of his conviction and sentence, it was incumbent upon the District Court to determine the latter question.

Even assuming arguendo, contrary to our argument in Point A, that the language of the Supreme Court extradition opinions does not indicate that the constitutionality of the basis for the demand is to be considered by the courts of the asylum state, we submit that this failure must be attributed to the fact that in those cases the question was not presented nor envisaged of an extradition violating the Constitutional guarantees by reason of the unconstitutionality of the basis for the demand. When an inquiry into the basis and result of the extradition is necessary, as in the instant case, in order to determine whether the custody in the asylum state violates the Fourteenth Amendment, such an inquiry must be held proper and necessary.

E. The Weight of Opinion Among the Circuit Courts Is in Accord With the District Court's Decision.

The only Circuit Court which has been directly presented with the instant issue is the Court of Appeals for the Third Circuit; its position, stated in *Johnson v. Dye*, 175 F. 2d 250 (1949), is in accord with that of the District Court herein. In the *Dye* case, as here, the fugitive sought release on a writ of habeas corpus on the basis that his custody for extradition was unconstitutional because of the unconstitutionality of his Georgia conviction, which was the basis of the extradition demand, and because of the

cruel and unusual punishment to which he had been subjected in Georgia in serving his sentence. The Court found it unnecessary to consider the unconstitutionality of the conviction, holding that his punishment had been cruel and unusual and thus constituted a violation of the Fourteenth Amendment, and that his custody for extradition was therefore invalid. One judge, Judge O'Connell, dissented in part, believing that the Court should determine whether the fugitive would undergo cruel and unusual punishment if extradited, rather than whether he had in the past; "the logic of invoking the judicial power to eliminate a threatened invasion of a basic constitutional right seems to me irresistible" (175 F. 2d at p. 259). Judge O'Connell thus agreed with his brethren on the basic point that the courts in the place of asylum must consider the constitutionality of some aspects the conduct of the demanding state insofar as it affects the constitutionality of the extradition; and as we shall show below, Middlebrooks' release should be ordered whether the standard of the majority or of Judge O'Connell—the retrospective or prospective—is adopted.

The authority of the *Dye* decision on the points here in issue is not diminished by its reversal in a *per curiam* opinion by the Supreme Court, since that reversal solely related to the Third Circuit's holding as to the exhaustion of State remedies. The fugitive in that case had petitioned for habeas corpus in the Pennsylvania State Courts, but had not appealed beyond the intermediate State court. The Third Circuit held that this clear failure to exhaust State remedies was not significant, on the basis that the doctrine of exhaustion of State remedies did not apply in extradition cases. In reversing the Circuit Court, the Supreme Court relied expressly on its opinion in

Ex parte Hawk, 321 U. S. 114, which concerned the general necessity for exhaustion of State remedies; and it is clear that the Supreme Court did not reach the merits of the case. In *Jackson v. Ruthazer,* 181 F. 2d 588 (1950), the Second Circuit stated that it interpreted the *Dye* reversal as meaning that the fugitive should have exhausted his remedies in the Pennsylvania State Courts,[20] and further stated:

> "For the purpose of this decision we may assume that Johnson v. Dye except for the exhaustion of remedies point was correctly decided." (181 F. 2d at p. 589.)[21]

The opinion of the Court of Appeals for the District of Columbia in *Johnson v. Matthews,* 182 F. 2d 677 (1950), differs in tenor from the *Dye* and *Ruthazer* opinions. It is, however, less persuasive than the latter two opinions for the purpose of the instant case, since it involved extra-

---

[20]And see, for this interpretation, *Horowitz and Steinberg,* The Fourteenth Amendment—Its Newly Recognized Impact, 23 So. Calif. Law Review (1950), 441, 442-3; note, Case of Fugitive From the Chain Gang, 2 (1949), Stanford Law Rev. 174, 183; discussion by District Court, R. 64-5. The view of the Court of Appeals for the District of Columbia (expressed in *Johnson v. Matthews,* 182 F. 2d 677) at note 22 (1950), that the Supreme Court meant by its reversal of the *Dye* case that the fugitive should address his contentions as to the unconstitutionality of the demanding State's conduct only to the courts of that State attributes to the Supreme Court a highly illogical basis of decision; as indicated *supra,* note 16, the question presented by the petition for habeas corpus in the asylum state is the constitutionality of the custody therein, which can only be determined by the courts in the place of asylum. There is no remedy for this custody in the demanding State, and there is not any true *procedural* question of exhaustion of remedies as between the courts of the asylum and demanding states. See dissenting opinion of Judge Bazelon in *Johnson v. Matthews.*

[21]The Court then determined that the state courts had rendered a full adjudication on the merits on the fugitive's contention that he had been subject to cruel and unusual punishment and that the federal courts need not re-examine this question.

dition for the purposes of trial, which as pointed out above, is directly controlled by the Constitutional provision on extradition and involves additional differing factors from the instant situation of extradition after conviction as well. A majority of two judges, one judge dissenting, held that the courts in the place of asylum should not consider the fugitive's allegations that he had been held without trial and in violation of due process by the demanding state prior to his escape. This holding was based largely on the Court's view of the Supreme Court decisions, which was similar to that adopted by appellants herein, and ignored the aspects of those opinions we have already discussed. Further, stating that the petition for habeas corpus in the asylum state only tested the validity of the detention therein, and that it did not "test the validity of the original or contemplated incarceration in the demanding state," the Court overlooked the fact that the latter question may determine the former.[22] The dissenting judge agreed with the view of Judge O'Connell in the *Dye* case and believed the case should be remanded for a determination of whether the fugitive had "suffered the alleged infringements and 'would be reasonably likely to undergo similar abuse if he were returned to Georgia.'"

We believe the majority in *Matthews* took a rigid view of extradition that was not justified by the Supreme Court decisions, and then exaggerated the possible evil consequences of a departure from this view.

---

[22]The Court's discussion of the availability of relief in Georgia ignores the realistic situation pointed out by the District Court in the instant case and in our argument *supra*, as to the fugitive's opportunity to avail himself of the remedies in the demanding State. And its explanation that the extradition provision of the Constitution is merely "procedural," does not answer the argument that the use of the *procedure* may cause a State to violate other provisions of the Constitution.

VI.

California's Custody of Middlebrooks for Extradition Was Unconstitutional Because His Conviction and Sentence, Upon Which the Extradition Demand Was Based and Which It Was to Enforce, Violated the Due Process Guarantee of the Fourteenth Amendment.

We have established in Point II that the Constitution does not permit of an exception to the limitations imposed on California by the Fourteenth Amendment when it exercises its power to extradite, nor, by the same token, does the Constitution permit the Court to refuse to inquire into the basis and result of the extradition demand insofar as these questions determine whether the extradition violates the Fourteenth Amendment. We therefore will now demonstrate the correctness of the District Court's determinations that Georgia's conviction and sentence of Middlebrooks was unconstitutional and that California's custody of Middlebrooks for extradition was therefore likewise unconstitutional.

A. Middlebrooks Was Convicted Without the Due Process of Law Guaranteed by the Fourteenth Amendment.

Even accepting the statements on Middlebrooks' Georgia indictment at their face value, and ignoring his testimony as to the details of his conviction and the District Court's findings thereon, it is clear that he was convicted without due process of law.

According to the indictment, Middlebrooks not only "waived being formally arraigned" but also "waived" a copy of the bill of indictment and list of the witnesses before the grand jury [R. 27]. The indictment itself thus shows the truth of the District Court's findings that

Middlebrooks was neither arraigned, given a copy of the charges, nor informed of the allegations against him; the fact that the indictment attributes the failure to afford him these protections to a "waiver," rather than to their complete disregard by the convicting court, as the District Court found [R. 83-84, 54-55], is immaterial, for under the Fourteenth Amendment Middlebrooks' "waiver" would in any event have been nugatory (see below, p. 45). The indictment itself also evidences a failure to observe even a modicum of procedural safeguards in making the notations as to the "waivers," for the waiver of arraignment is signed only by the State's Solicitor General, and the waiver of the copy of the indictment and list of witnesses is wholly unsigned [R. 27, 50]. Again, it seems apparent from the papers that any opportunity given to Middlebrooks to plead was merely a gesture, with his conviction foreordained; for a plea of guilty is noted as the basis for his sentence [R. 28-39] although the indictment states that he plead not guilty [R. 27]. And no trial could have been held that would have been more than nominal since Middlebrooks had "waived" all the rights essential to preparation for trial. Finally, the indictment itself shows that no counsel was afforded Middlebrooks; and with respect to the right to counsel not even a "waiver" is noted [R. 27, 50].

On these facts, the violations of due process are flagrant. The defendant's right to be fully informed of the charges against him is a fundamental of due process; as the Supreme Court said with regard to proceedings similar to those in the instant case:

> "He (the defendant) had been denied any real notice of the true nature of the charge against him, the first and most universally recognized requirement

of due process." (*Smith v. O'Grady,* 312 U. S. 332, 334.)[23]

And the State could not relieve itself by Middlebrooks' alleged waiver of the duty of giving him such real notice of the charge, by dispensing both with arraignment and a copy of the indictment. For a waiver of such rights by an uneducated boy of 17, acting without the advice of counsel or of any experienced person, could not possible be deemed an "intentional relinquishment or abandonment of a known right or privilege" with a full understanding of its value; and it is only in the event of such an informed waiver that the State's duty to accord procedural rights is discharged.[24] Indeed, it is hard to conceive of any circumstances under which a waiver such as Middlebrooks allegedly made would be valid; for the fact of such a waiver would almost of itself show either that there was a failure to understand the importance of the rights or that the defendant's judgment was overborne by external pressures. Further, even if the rights were of less significance than those Middlebrooks allegedly waived, it would be a violation of due process for the State to take advantage of a waiver by a person of Middlebrooks' ignorance, in order to deny him procedures generally accorded to defendants.

---

[23]"No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts." (*Cole and Jones v. Arkansas,* 338 U. S. 345; see similar emphasis on these rights in *In re Oliver,* 333 U. S. 257.)

[24]As to the requirements of understanding and deliberation to validate a waiver of the right to counsel, see *Glasser v. United States,* 315 U. S. 60, 71; *Adams v. U. S. ex rel McCann,* 317 U. S. 269; *von Moltke v. Gillies,* 332 U. S. 708, 723; *Johnson v. Zerbst,* 304 U. S. 458, 464.

The failure to afford counsel to Middlebrooks was, under the circumstance of his case, also a violation of due process. And while the District Court's finding that Middlebrooks requested counsel and his request was ignored [R. 83] underlines the unfairness of the proceeding, the failure to afford counsel was a denial of due process whether or not counsel was requested.[25]

As the Supreme Court summarized its position in *Uveges v. Pennsylvania,* 335 U. S. 437, 440, quoted by the District Court [R. 59], while all members of the Court do not agree that due process requires the State to protect the accused by offering counsel in the case of every serious crime, at the least there is unanimity that the State must offer "counsel for all persons charged with serious crimes, when necessary for their adequate defense, in order that such persons may be advised how to conduct their trials." Middlebrooks, the defendant here, was young and unschooled [R. 83]; nothing in his background equipped him to deal single-handed with the criminal proceedings against him [R. 124-128]. He was charged with a felony which carried a maximum penalty of twenty years and entailed punishment by assignment to the chain gang; and he was in fact assigned to the chain gang for five years [R. 83, 84]. Even if it were assumed that he had an opportunity to determine whether to plead guilty, and that he in fact did so, the question of whether or not to make this choice is one on which such an untutored defendant needs assistance.[26] Middlebrooks' need for

---

[25]*Tomkins v. Missouri,* 323 U. S. 485; *Rice v. Olson,* 324 U. S. 786; *Canizio v. New York,* 327 U. S. 82, 85; *Gibbs v. Burke,* 337 U. S. 773.

[26]*Townsend v. Burke,* 334 U. S. 736; *De Meerleer v. Michigan,* 329 U. S. 663; *Williams v. Kaiser,* 321 U. S. 471, 475.

counsel in order to assure that he did not plead guilty inadvisedly and to enable him to make a fair presentation of whatever defense he had against the charges, was greatly accentuated by the judge's disregard of his rights and failure to protect him from the disadvantages of his lack of representation.[27] Here all the circumstances stressed by the Supreme Court as showing a need for counsel were present: Middlebrooks' youth and inexperience "in the intricacies of criminal procedure"[28] and the failure of the judge to make any effort to protect his rights. And the form of Middlebrooks' alleged waivers alone are sufficient to show his prejudice from the lack of counsel. It is clear that counsel was essential for Middlebrooks' "adequate defense"; that the judgment against him cannot be regarded, because of the absence of counsel, as a true reflection of the facts of his case; and that the failure to afford counsel was a deprivation of due process of law, invalidating the conviction.

* * * * * * * * *

The details of the conviction process, as found by the District Court, completes the picture of a total disregard of Middlebrooks' rights which is apparent from the notations on the indictment. After being held in jail for several months after the indictment Middlebrooks was told by his jailer to get ready for trial in fifteen minutes [R.

---

[27]The Supreme Court has repeatedly stressed this factor as a determinant of the need for counsel. See the quotations in the District Court's opinion from *Uveges v. Pennsylvania*, 335 U. S. 437, 440; *Gibbs v. Burke*, 337 U. S. 773, 781 [R. 60]; *Townsend v. Burke*, 334 U. S. 736.

[28]*Uveges v. Pennsylvania, supra; Powell v. Alabama*, 287 U. S. 45, 69, 71; *Haley v. Ohio*, 332 U. S. 596; *Marino v. Ragen*, 327 U. S. 791. Compare *Marino v. Ragen* as to an unsigned waiver; compare also *Townsend v. Burke*, 334 U. S. 736; *Haley v. Ohio, supra.*

49, 83]. Without being informed of the charges against him [R. 49, 83], he was brought to the courtroom. No formal proceedings were held, the Judge merely saying to him, "Don't you know you can't go around breaking the laws of Georgia?" Though Middlebrooks denied he'd broken any laws and said he wanted a lawyer, the Judge forthwith, and without further inquiry, sentenced him to five years in jail. In view of the District Judge's opportunity to hear and observe Middlebrooks, his express finding as to the latter's credibility [R. 55], and the consistency of these findings with the notations on the indictment, they must be accepted as correct. They establish a flagrant and undeniable contravention of due process in Middlebrooks' conviction.

B. Appellee's Sentence Constituted a Violation of Due Process of Law Guaranteed by the Fourteenth Amendment in That It Imposed Cruel and Unusual Punishment Upon Him.

The District Court concluded, with ample basis, that Middlebrooks, who was assigned to a chain gang for service of his sentence, was forced to serve his sentence "under brutal and inhuman conditions" [R. 84]. It can hardly be doubted that the conditions which the District Court found to exist reflected a "systematic, deliberate and methodical employment of aggravated brutality" [R. 86], in the routine use of shackles, filthy and unsanitary living conditions, and the use as punishment of sweat boxes and stocks, which can only be defined as methods of torture [R. 50-52, 84-85, 140-159, 166, 172-189]. These conditions on the chain gang "were at all times herein material, and are, open, notorious and of long standing" [R. 85-86]; Middlebrooks' treatment was in no sense unusual or the result of any temporary or unusual circumstances. Rather,

assignment to the chain gang and the concomitant conditions of deliberate degradation and cruelty "was an integral part of the penal system of the State of Georgia at the time that petitioner was sentenced" and "was an inseparable part of the sentence imposed upon" Middlebrooks [R. 86].

A method of punishment showing such systematic brutality as that here existing falls below generally accepted standards of humanitarian treatment; thus, it constitutes "cruel and unusual punishment" in the sense of the prohibition of the Eighth Amendment to the Constitution, which obviously incorporates a humanitarian standard. And the District Court's reasoning that the due process clause of the Fourteenth Amendment prohibits the State from imposing cruel and unusual punishment in the treatment of prisoners is, we submit, irrefutable. That freedom from cruelty and degradation, pursued wantonly as an end in itself, is one of the "fundamental principles of liberty and justice" guaranteed by the Fourteenth Amendment[29] seems clear; that guarantee includes those aspects of the first Ten Amendments basic to liberty. While, as the District Court pointed out, the Supreme Court has not definitively passed on the question of whether this freedom is guaranteed against State action, in its only directly pertinent decision: *Francis v. Resweber*,[30] *all* the Justices indicated that cruel and unusual punishment is prohibited by due process. The majority differed from the minority in that they did not regard the method of execution there in issue as a cruel and unusual punishment; however, the majority assumed the premise expressed in the dissent that if this method was cruel and unusual it would be prohibited by

---

[29]*Palko v. Connecticut*, 302 U. S. 319, 328.

[30]329 U. S. 459.

the Fourteenth Amendment (see quotation from majority opinion in opinion of District Court [R. 64]). And the Third Circuit's square holding that the due process clause prohibited cruel and unusual punishment was left unaffected by the Supreme Court's reversal of the opinion on the grounds of the failure to exhaust State remedies.[31]

Since the cruelties and tortures of the chain gang system were an "integral part of the chain gang systems [R. 86], which was of general application to persons confined upon conviction of felony" [R. 85-86], it was an inseparable part of the sentence of felony imposed upon Middlebrooks; his sentence therefore violated due process of law and must be regarded as void.[32] Furthermore, the District Court concluded, and there is no evidence or contention to the contrary, that the cruel and inhuman conditions to which Middlebrooks was subjected continue to be an integral part of the chain gang system and that Middlebrooks would necessarily again be subjected to them if returned to Georgia [R. 86, 90].

---

[31]In *Johnson v. Dye*, 175 F. 2d 250 (1949), reversed *per curiam* on the basis of *Ex parte Hawk*, see discussion *supra*, p. 41. The comments on the Third Circuit's decision have approved its conclusion that the due process clause prohibited cruel and unusual punishment. See note, Case of Fugitive From a Chain Gang, 2 (1949) Stanford Law Rev. 174, 183; Horowitz and Steinberg, The Fourteenth Amendment, 23 So. Calif. Law Rev. 442, 451 (1950).

[32]See *Weems v. United States*, 217 U. S. 349, in which the Supreme Court held that a sentence imposed cruel and unusual punishment within the meaning of a provision of the *Philippine* Bill of Rights identical to the Eighth Amendment. Since any sentence which could be imposed would under the applicable statute include that punishment, the sentence was held void and the prisoner ordered released.

C. In View of the Unconstitutionality of Appellee's Conviction and Sentence, the District Court Was Correct in Ordering California to Release Appellee From Custody on the Grounds That Such Custody Violated the Constitution.

California's custody of Middlebrooks is not only based upon conviction and sentence which we have shown to be unconstitutional, but such custody is for the purpose of subjecting him to further unconstitutional confinement; from either standpoint, California's custody is a violation of the Constitution.

The underlying basis of California's custody is an unconstitutional conviction, which is, in law, a nullity; thus, California's custody has no constitutional or valid basis. See *Smith v. O'Grady,* 312 U. S. 332, 334; *Johnson v. Zerbst,* 304 U. S. 458 at p. 468; *Norton v. Shelby County,* 118 U. S. 425, 442; *Smith v. Cahoon,* 283 U. S. 553, 562.

> "Moreover, due process requires that no other jurisdiction shall give effect . . . to a judgement elsewhere acquired without due process." (*Griffin v. Griffin,* 327 U. S. 220, 229.)

And from the standpoint of the purpose and prospective effect of California's custody of Middlebrooks, it cannot be disputed, as the District Court determined, that Middlebrooks' unconstitutional confinement would be resumed if California were permitted to continue him in custody and to extradite him [R. 86, Finding 8; 91, Conclusion 11]; such resumption is, of course, the purpose of the extradition, as stated explicitly in the extradition request [R. 19; see District Court's opinion, R. 68, note 9]. Without in any way impugning the judicial processes of Georgia, it is clear (see discussion, *supra,* note 8) that there is no likelihood of Middlebrooks ever securing release from his

unconstitutional confinement if he were extradited to Georgia. But even disregarding the reality that if Middlebrooks were returned he would be confined for the duration of his sentence plus any penalty imposed for escape, it is indubitable that his confinement in Georgia would be reimposed for a substantial period of time.

Thus, the purpose of California's custody is to effectuate and enforce an unconstitutional conviction and sentence, and it is as much invalidated by this purpose as was and would be Georgia's custody of Middlebrooks for this purpose. From the standpoint of Georgia's reinstitution of Middlebrooks' unconstitutional confinement, California's aid is a *sine qua non* for Georgia's prospective unconstitutional act; and a State's use of its coercive power to enable another party to perform an unconstitutional act or its use to implement and enforce such an act, is itself a violation of the Constitution. While this constitutional issue has not heretofore been presented in the situation of a State rendering assistance to another State, because of the rarity of such assistance apart from extradition, the principle is clearly demonstrated by those cases in which a State has lent its power for the enforcement of orders, restrictions, or penalties other than those the State has itself established or adopted such an order as the basis for State action. Thus, in *Shelley v. Kramer*, 334 U. S. 1, where the question was the constitutionality of the State's enforcement by injunction of a restriction on land ownership established by private contract, the Court rejected the contention that "the participation of the State is so attenuated in character as not to amount to State action within the meaning of the Fourteenth Amendment," on the basis that the State "had made available . . . the full coercive power of government" to enforce the restriction established

by the contract (334 U. S. at pp. 13, 19). The State acted unconstitutionally, though it did no more than give the remedy of injunction, because this action was based upon the discriminatory restriction, and made possible its enforcement through contempt proceedings.[33]

By the same token, California acted unconstitutionally in using its extradition procedure, to enforce, and enable the further enforcement, of Middlebrooks' unconstitutional conviction and sentence.

Under well-established principles, California, through its Governor who issued the extradition warrant and the appellant who took appellee into custody, interpreted and applied California's extradition statute in an unconstitutional manner, in that his extradition was based upon and would enforce an unconstitutional and void conviction and sentence. Thus, Middlebrooks' custody by California was in violation of the Constitution, and it was necessary for the District Court, under its power to grant the writ of habeas corpus (28 U. S. C., Sec. 2241), to order appellee's release.

---

[33]Similarly, the State was held to act unconstitutionally in adopting and enforcing restraints and orders it had not itself established or initiated, in *Marsh v. Alabama,* 326 U. S. 501 (enforcement by arrest, of private no trespassing order which infringed freedom of speech and religion); *Eubank v. City of Richmond,* 226 U. S. 137; *Washington v. Roberge,* 278 U. S. 116; *Harmon v. Tyler,* 273 U. S. 668 (attacking penal sanction to property holders' unreasonable zoning restrictions); *Nixon v. Condon,* 286 U. S. 73; *Smith v. Allwright,* 321 U. S. 649 (State enforcement of organization's determinations of voting qualifications).

Conclusion.

It is respectfully submitted that the District Court's judgment should be affirmed.

Loren Miller,
Elizabeth Murray,
A. L. Wirin,
Nanette Dembitz,
Attorneys for Appellees.

Thurgood Marshall,
Edward Maddox,
Of Counsel,
National Association for Advancement of Colored People.

Edmund Cooke,
Clore Warne,
Of Counsel,
American Civil Liberties Union.

Will Maslow,
Of Counsel,
American Jewish Congress.

No. 12572

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN D. ROSS, Sheriff of Santa Barbara County, State of California,

Appellant,

vs.

SYLVESTER MIDDLEBROOKS, JR.,

Appellee.

APPELLANT'S REPLY BRIEF.

DAVID S. LICKER,
District Attorney of the County of Santa Barbara;

VERN B. THOMAS,
Assistant District Attorney of the County of Santa Barbara,
Court House, Santa Barbara.
Attorneys for Appellant.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TABLE OF AUTHORITIES CITED

Cases

Statutes

Textbooks

No. 12572

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN D. ROSS, Sheriff of Santa Barbara County, State of California,

Appellant,

vs.

SYLVESTER MIDDLEBROOKS, JR.,

Appellee.

APPELLANT'S REPLY BRIEF.

Part V of appellee's brief (pp. 21-28) advances the argument that the extradition clause of the Constitution (Art. IV, Sec. 2, Clause 2) and the scope of restricted inquiry embodied in such provision is applicable solely to extradition of fugitives for purposes of trial and not to convicted fugitives.

The weight of authority is directly *contra* to appellee's position.

In *Hughes v. Pflanz* (Sixth), 138 Fed. 90 (1905), the court said at page 983:

> "The term 'charged with crime,' as used in the Constitution and statute, seems to us to have been used in its broad sense, and to include all persons accused

of crime. It would be a very narrow and technical construction to hold that after the accusation, and before conviction, a person could be extradited, while after conviction, which establishes the charge conclusively, he could escape extradition. The object of the provisions of the Constitution and statute is to prevent the escape of persons charged with crime, whether convicted or unconvicted, and to secure their return and punishment if guilty. Taking the broad definition of 'charged with crime' as including the responsibility for crime, the charge would not cease or be merged in the conviction, but would stand until the judgment is satisfied. It would include every person accused, until he should be acquitted, or until the judgment inflicted should be satisfied. Any other construction would prevent the return of escaped convicts upon the charge under which they had been sentenced, and defeat in many instances the ends of justice.

"The relator was convicted of the crime of larceny in Indiana, and sentenced, and the term of sentence has not yet expired. That charge of larceny continues to be a charge against him until the sentence has been performed, and he therefore stands 'charged with crime,' within the meaning of that term as used in the federal Constitution. The question has not often been raised, but in the only instances called to our attention where it has been the foregoing views have been adopted. *In re* Hope, 10 N. Y. Supp. 28; Drinkall v. Spielgel, Sheriff, 68 Conn. 441, 36 Atl. 830; 36 L. R. A. 486."

In *Reed v. Colpoys* (1938), U. S. Court of Appeals for the District of Columbia, 99 F. 2d 396, it was urged that a paroled prisoner who had violated his parole was not a fugitive from justice within the terms of Art. IV, Sec. 2,

Clause 2, of the U. S. Constitution. The court said at page 397:

> "The contention is wholly without merit. It is settled law that one is a fugitive from justice within the purview of the Constitutional provision who, having been charged with crime in the demanding State, leaves that State for any purpose whatsoever. Appleyard v. Massachusetts, 1906, 203 U. S. 222, 227, 27 S. Ct. 122, 51 L. Ed. 161, 7 Ann. Cas. 1073; *Ex parte* Reggel, 1885, 114 U. S. 642, 5 S. Ct. 1148, 29 L. Ed. 250; Roberts v. Reilly, 185, 116 U. S. 80, 6 S. Ct. 291, 29 L. Ed. 544; Barrett v. Bigger, 1927, 57 App. D. C. 81, 17 F. 2d 669. The law is also settled that a paroled prisoner who has, in violation of parole, left the State in which he was convicted of crime is, within the Constitutional provision in question, a person charged with crime in the State where he was convicted and one who has fled from the justice of that State, so that he is subject to extradition. Drinkall v. Spiegel, Sheriff, 1896, 68 Conn. 441, 36 A. 830, 36 L. R. A. 486; Hughes v. Pflanz, 6 Cir., 1905, 138 F. 980. It is also settled that a paroled prisoner who has left the State of conviction pursuant to the terms of his parole, but later violates the same, is a person charged with crime and a fugitive from justice subject to extradition. People *ex rel.* Hutchings v. Mallon, 218 App. Div. 461, 218 N. Y. S. 432, affirmed without opinion 1927, 245 N. Y. 521, 157 N. E. 842; *Ex parte* Nabors, 1928, 33 N. M. 324, 267 P. 58."

In *Brewer v. Goff* (1943), Circuit Court of Appeals, Tenth Circuit, 138 F. 2d 710, the court at page 712 said:

> "The only prerequisites to extradition from one state to another are, that the person sought to be extradited is substantially charged with a crime against the laws of the demanding state, and that he is a

fugitive from justice. McNichols v. Pease, 207 U. S. 100, 108, 109, 28 S. Ct. 58, 52 L. Ed. 121; Appleyard v. Massachusetts, *supra;* Roberts v. Reilly, *supra.* Admittedly, the extradition papers are in proper form, that is, he is substantially charged with having violated his parole in California, and it is well established that a parole violation is an extraditable offense within the meaning of the statute. Reed v. Colpoys, 69 App. D. C. 163, 99 F. 2d 396, certiorari denied 305 U. S. 598, 59 S. Ct. 97, 83 L. Ed. 379; *Ex parte* Williams, 10 Okl. Cr. 344, 136 P. 597, 51 L. R. A., N. S., 668; *Ex parte* McBride, 101 Cal. App. 251, 281 P. 651; People *ex rel.* Westbrook v. O'Neill, 378 Ill. 324, 38 N. E. 2d 174. The inquiry whether the appellant is a fugitive from justice is one of fact, to be resolved by the chief executive of the State of Oklahoma to whom the demand for extradition is made, and his judgment thereon is not subject to judicial impeachment by habeas corpus unless it conclusively appears that the person sought to be extradited could not be a fugitive from justice under the law."

U. S. ex rel. Faris v. McClain, District Court, M. D. Penn. (1942), 42 Fed. Supp. 429, held that a petitioner on habeas corpus who had been charged and convicted for the crime of forgery and sentenced for the crime, and who thereafter escaped, was still charged with forgery in Virginia.

In *Pelley v. Colpoys,* 122 F. 2d 12 (1941), the petitioner for a writ resisting extradition sought to raise the issue that a suspended sentence under North Carolina law was limited to five years and that the period had expired prior to the request of the governor for extradition,

and that the extradition requested violated the Fourteenth Amendment to the Constitution of the United States. The court said at page 14:

> "Petitioner is relying on a period of limitations, a matter which can be raised only in the courts of North Carolina. See Biddinger v. Commissioner of Police, 245 U. S. 128, 38 S. Ct. 41, 43, 62 L. Ed. 193, where the Supreme Court said: 'This much, however, the decisions of this court make clear: That the proceeding is a summary one, to be kept within narrow bounds, not less for the protection of the liberty of the citizens than in the public interest; that when the extradition papers required by the statute are in the proper form the only evidence sanctioned by this court as admissible on such a hearing is such as tends to prove that the accused was not in the demanding state at the time the crime is alleged to have been committed; and, frequently and emphatically, that defenses cannot be entertained on such a hearing, but must be referred for investigation to the trial of the case in the courts of the demanding state.' "

A writ of certiorari was denied by the Supreme Court of the United States on October 13, 1941, 62 Sup. Ct. 70, 86 Law Ed. 499.

35 Corpus Juris Secundum, Section 9, at page 323, in part, states:

> "As used in constitutional and statutory provisions relating to extradition, the term 'charged' is construed in its broad signification to cover any proceeding which a state may see fit to adopt by which a formal accusation is made against an alleged criminal. In a stricter sense, however, a person is 'charged' with crime when an affidavit is filed alleging the commis-

sion of the offense and a warrant is issued for his arrest. A person remains charged with crime within the meaning of the constitutional and statutory provisions although he has been convicted, while the judgment of conviction remains unsatisfied. . . ."

Other citations supporting the proposition that convicted prisoners who escape or who are released on parole and violate the terms of parole are notwithstanding such conviction, charged with crime within the provisions of Article IV, Section 2, Clause 2 and therefore subject to extradition:

78 *A. L. R.* 419 on the subject "Extradition of Escaped or Paroled Convict or One at Liberty on Bail";

22 *Am. Jur.* 264, Sec. 25, on the subject entitled "Paroled or Escaped Convicts";

35 *C. J. S.*, Sec. 327, Subdiv. (2), on the subject "Escaped or Paroled Prisoners";

State ex rel. Lee v. Brown, 166 Tenn. 669, 64 S. W. 2d 841, 91 A. L. R. 1246, certiorari denied 292 U. S. 638, 78 L. Ed. 1491;

People ex rel. Hesley v. Ragen (1947), 396 Ill. 554, 72 N. E. 2d 311;

Tines v. Hudspeth, 164 Kan. 471, 190 P. 2d 867, 871;

Ex parte Foster (1936), 61 P. 2d 37, 60 Okla. Cr. 50;

Ex parte Haynes (1924), 267 S. W. 490, 98 Tex. Cr. R. 609.

The premise therefore urged by appellee to the effect that the limited scope of inquiry embodied in Article IV,

Section 2, Clause 2, is not applicable to extradition of convicted prisoners is clearly untenable. The premise being untenable, it follows that appellee's conclusion that asylum states may consider and are in fact compelled to make determination whether the judgments of the courts of sister states contravened or violated the due process clause is erroneous. *Williams v. North Carolina,* 317 U. S. 287, and *Griffin v. Griffin,* 327 U. S. 220, are therefore clearly not in point because they are not extradition cases.

Moreover, provisions of the Uniform Extradition Act in force and effect in California are in direct conflict with the proposition urged by appellee. One of such provisions, Section 1548.2 of the Penal Code of the State of California, provides in part as follows:

> ". . . Such demand shall be accompanied by a copy of an indictment found or by information or by a copy of an affidavit made before a magistrate in the demanding State together with a copy of any warrant which was issued thereon; or such demand shall be accompanied by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding State that the person claimed has escaped from confinement or has violated the terms of his bail, probation or parole. . . ."

The designated section has heretofore been quoted in appellant's opening brief at pages 39 and 40.

Also at pages 40 and 41 of appellant's opening brief, Section 1549.2 of the Penal Code of the State of California was quoted relating to the duty of the governor to

issue a warrant of arrest if a demand conformed to the provisions of the chapter, and also Section 1553.2 of the Penal Code relative to the restricted scope of inquiry by the governor and California courts in extradition matters.

Other issues raised in appellee's brief have been argued in appellant's opening brief.

Respectfully submitted,

DAVID S. LICKER,
District Attorney of the County of Santa Barbara;

VERN B. THOMAS,
Assistant District Attorney of the County of Santa Barbara,

Attorneys for Appellant.

No. 12573

United States
Court of Appeals
for the Ninth Circuit.

G. CLIFFORD SMITH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
District of Arizona.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12573

United States
Court of Appeals
for the Ninth Circuit.

G. CLIFFORD SMITH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
District of Arizona.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

INDEX PAGE

ATTORNEYS OF RECORD

H. C. WHEELER, Esquire,

111 West Alameda,
Tucson, Arizona,

IRVING KIPNIS, Esquire,

52 West Alameda,
Tucson, Arizona,

Attorneys for Appelant.

F. E. FLYNN, Esquire,

United States Attorney,

Federal Building,
Tucson, Arizona,

Attorney for Appellee.

COMMISSIONER'S RECORD

District Court of the United States, District of Arizona, Tucson Division

GJ-11736 Tuc.

Commissioner's Docket No. 2

Case No. 594

UNITED STATES OF AMERICA,

vs.

G. CLIFFORD SMITH.

Complaint for Violation of U.S.C. Title 19

Section 1001

Before: Thomas H. McKay,
U. S. Commissioner at Tucson, Arizona.

The undersigned complainant being duly sworn states:

That on or about March 18, 1949, at Tucson, Arizona, in the District of Arizona, G. Clifford Smith did unlawfully, wilfully and knowingly submit a voucher for payment to the Veterans Administration for tools and books in the amount of $700 as having been issued to seven students of the Arizona Institute of Aeronautics when in truth and in fact tools and books had been issued by said Institute to said students in a lesser amount.

And the complainant further states that he believes that Merle Moore, CPA, 11 E. Pennington St., Tucson, Arizona; Paul R. Ehlers, Arizona Institute of Aeronautics, Tucson, Arizona, are material witnesses in relation to this charge.

/s/ LEWIS W. KOLDEWEY,
Special Agent, FBI.

Sworn to before me, and subscribed in my presence, May 23, 1949.

[Seal] /s/ THOMAS H. McKAY,
United States Commissioner.

[Title of District Court and Cause.]

Warrant of Arrest

To U. S. Marshal, Dist. of Arizona, or any other officer authorized to serve this process:

You are hereby commanded to arrest G. Clifford Smith, and bring him forthwith before the nearest available United States Commissioner to answer to a complaint charging him with submitting a voucher to the Veterans Administration for payment for tools and books in an amount greater than furnished by defendant, in violation of U.S.C. Title, 18, Section 1001.

Date May 23, 1949.

[Seal] /s/ THOMAS H. McKAY,
United States Commissioner.

Return

Received May 23, 1949, at Tucson, and executed by arrest of G. C. Smith, at 2200 E. Glen, Tucson, on May 25, 1949.

/s/ LEWIS W. KOLDEWEY,
Special Agent, F. B. I..

Date May 25, 1949.

[Title of District Court and Cause.]

Complaint for Violation of U. S. C. Title 18, Section 1001

Before Thomas H. McKay,
U. S. Commissioner at Tucson, Arizona.

The undersigned complainant being duly sworn states:

That on or about March 18, 1949, at Tucson, Arizona, in the District of Arizona, G. Clifford Smith, did unlawfully, wilfully and knowingly submit a voucher for payment to the Veterans Administration for tools and books in the amount of $700 as having been issued to seven students of the Arizona Institute of Aeronautics, when in truth and in fact tools and books had been issued by said Institute to said students in a lesser amount.

And the complainant further states that he believes that Merle Moore, CPA, 11 E. Pennington St., Tucson, Arizona; Paul R. Ehlers, Arizona Institute of Aeronautics, Tucson, Arizona, are material witnesses in relation to this charge.

/s/ LEWIS W. KOLDEWEY,
Special Agent, FBI.

Sworn to before me, and subscribed in my presence, May 23, 1949.

[Seal] /s/ THOMAS H. McKAY,
U. S. Commissioner.

United States Commissioner
District of Arizona

Record of Proceedings in Criminal Cases

Before Thomas H. McKay,
U. S. Commissioner at Tucson, Arizona.

[Title of Cause.]

Complaint filed on May 23, 1949, by Lewis W. Koldewey, Official title FBI, charging violation of United States Code, Title 18, Section 1001, on March 18, 1949, at Tucson, Arizona, in the Tucson division of the district of Arizona, as follows: Submit a voucher for payment to VA for tools and books in the amount of $700, as having been issued to students of Arizona Institute of Aeronautics, when in truth and in fact issuance in a lesser amount had been made.

Warrants Issued:

Date ..... Warrant for G. Clifford Smith, to U. S. Marshal or other officer, etc.

Substance of return Rec'd May 23, 1949, executed by arrest of defendant on May 25, 1949. Lewis W. Koldewey, Special Agent, FBI.

Proceedings on First Presentation of Accused to Commissioner:

Date May 25, 1949. Arrested by FBI, on warrant of Thomas H. McKay.

Appearances:

K. BERRY PETERSON,

U. S. Attorneys Office,

For United States.

HAROLD WHEELER,

111 W. Alameda St.,

For Accused.

Proceedings taken: Complaint was duly read and explained to accused who stated he understood the charge against him. Counsel requested preliminary hearing which was set for June 2, 1949.

Outcome: Matter continued to June 2, 1949, for preliminary hearing.

Bail fixed May 25, 1949. Amount, $1,000.00. Bonded May 25, 1949, by surety, G. Clifford Smith, Elizabeth O. Smith, 2200 E. Glen, Tucson, Edward B. and Jean M. Thompson, 2128 E. Copper, Tucson, who justified by affidavit dated May 25, 1949.

Subpoenas for Witnesses Issued:

May 27, 1949, for John P. Burke, Wm. McConnell, Edward Scruggs, Fred W. Streitcher, Capt. John A. Wylie, Jr., at request of defendant.

Substance of return: Rec'd May 31, 1949, and executed by service same date.

EDMUND L. SCWEPPE,
Deputy Marshal.

May 31, 1949, for Joaquin C. Urbano, Paul R. Ehlers, James E. Krug, Thomas L. Beck, Antonio V. Bustamente, Albert L. Thomale, Merle W. Moore, Oscar M. Gomez, at request of United States of America.

Substance of return: Rec'd. May 31, 1949, and executed by service on June 1, 1949.

SCHWEPPE,
Deputy.

Preliminary Examination:

Date, June 2, 1949.

Appearances:

K. BERRY PETERSON,
U. S. Attorneys Office,
For United States,

HAROLD WHEELER,
111 W. Alameda St.,
For Accused.

Witnesses For United States:

Oscar W. Gomes, 332 E. Penn. Drive, Tucson,

Albert L. Thomale, 4136 Santa Barbara, Tucson; Antonio V. Bustamente, 140 E. 33rd St., Tucson; Thomas L. Beck, 132 W. Delano, Tucson; James E. Krug, 725 E. 38th St., Tucson; Joaquin C. Urbano, 4526 S. 11th Ave., Tucson; Paul R. Ehlers, 1644 E. 12th St., Tucson; Merle W. Moore, 11 E. Pennington, Tucson.

Witness payroll containing 8 names certified to United States Marshal for payment June 2, 1949.

Proceedings taken: Preliminary hearing held. Counsel thereafter advised that Grand Jury action would not be waived.

Outcome: Accused held for Grand Jury.

Bail fixed, June 2, 1949. Amount $1,000. Bonded as hereinafter set forth, and that bond continued.

Certified to be a correct transcript.

Made this 2nd day of June, 1949.

Transmitted to Clerk of United States District Court for the ..... district of Arizona, Tucson Division, June 3, 1949.

.....

United States Commissioner.

District Court of the United States
District of Arizona
Tucson Division

Commissioner's Docket No. 2
Case No. 594

UNITED STATES OF AMERICA,

vs.

G. CLIFFORD SMITH.

Temporary Commitment of G. Clifford Smith

To the United States Marshal of the.....District or Arizona:

You are hereby commanded to take the custody of the above named defendant and to commit him with a certified copy of this commitment to the custodian of a place of confinement within this district approved by the Attorney General of United States where the defendant shall be received and safely kept until discharged in due course of law. The above named defendant has been arrested but not yet fully examined by me upon the complaint of Lewis W. Koldewey, charging that on or about March 18, 1949, at Tucson, in the District of Arizona, the defendant did unlawfully make a false voucher for payment by the Veterans Administration, in violation of U.S.C. Title 18, Section 1001; and he has been directed to furnish bail in the sum of One Thousand dollars ($1,000.00) for his appearance before me at Tucson, Arizona, in accordance with all

my orders and directions relating thereto, and he has failed to do so.

[Seal] /s/ THOMAS H. McKAY,
United States Commissioner.

Dated: May 25, 1949.

Return

Received this commitment and designated prisoner on May 25, 1949, and on May 25, 1949, committed him to Pima Jail, and left with the custodian at the same time a certified copy of this commitment.

Dated: May 25, 1949.

B. J. McKINNEY,
United States Marshal.
..... District of Arizona.

By /s/ H. B. ROGERS,
Deputy.

[Endorsed]: Filed June 3, 1949.

In the District Court of the United States
For the District of Arizona

C-11697 Tucson

INDICTMENT

Viol: 18 USC 287 (False claim against Gov't.)

United States of America,
District of Arizona—ss:

In the District Court of the United States in and for the District of Arizona, At the April term thereof, A.D. 1949.

The Grand Jurors of the United States, impaneled, sworn, and charged at the term aforesaid, of the Court aforesaid, on their oath present, that G. Clifford Smith, on or about the 25th day of March, A.D., 1949, and within the said District of Arizona, presented and caused to be presented to the Veterans Administration, an Agency of the United States of America, for payment, a claim in the name of and on behalf of the Arizona Institute of Aeronautics, a corporation, in the amount of Seven Hundred ($700.00) Dollars against the Government of the United States, for books and tools claimed to have been furnished to Albert L. Thomale, James E. Krug, Antonio V. Bustamente, Oscar M. Gomez, Joseph L. Gargano, Thomas L. Beck and Joaquin C. Urbano, who were then and there, or had been trainees at the said Arizona Institute of Aeronautics, in the amount and of the value of

One Hundred ($100.00) Dollars to each of said trainees, and that said defendant then and there knew the claim to be fraudulent in that the said Arizona Institute of Aeronautics had not furnished the said trainees or either of them tools and books in the amount of and in the value of One Hundred ($100.00) Dollars each, or in the total amount of Seven Hundred ($700.00) Dollars.

Second Count: And the Grand Jury further charges that G. Clifford Smith, on or about the 19th day of April, A.D., 1949, and within the said District of Arizona, presented and caused to be presented to the Veterans Administration, an Agency of the United States of America, for payment, a claim in the name of and on behalf of the Arizona Institute of Aeronautics, a corporation, in the amount of Three Hundred ($300.00) Dollars against the Government of the United States, for books and tools claimed to have been furnished to Charles R. Hunt, George E. Patterson and Charles L. Gadbois, who were then and there, or had been, trainees at the said Arizona Institute of Aeronautics, in the amount and of the value of One Hundred ($100.00) Dollars to each of said trainees, and that said defendant then and there knew the claim to be fraudulent in that the said Arizona Institute of Aeronautics had not furnished the said trainees or either of them tools and books in the amount of and in the value of One Hundred ($100.00) Dollars each, or in

the total amount of Three Hundred ($300.00) Dollars.

F. E. FLYNN,
United States Attorney for
the District of Arizona,

/s/ K. BERRY PETERSON,
Assistant.

/s/ W. L. ALBION,
Foreman of the Grand Jury.

[Endorsed]: Filed June 16, 1949.

In the District Court of the United States
In and For the District of Arizona

No: C-11697

United States of America,

Plaintiff,

vs.

G. Clifford Smith,

Defendant.

MOTION TO DISMISS

Viol: 18 U.S.C. 287, False Claim Against Government

And now comes the defendant herein, and says that the indictment herein is not sufficient in law to require the defendant to plead thereto, and this defendant moves the Court to dismiss the indictment, and for special reasons shows unto the Court the following:

1. There has been no showing of a fraudulent intent on the part of the defendant. The facts as shown to date have indicated that a drawing account might be used by the Arizona School of Aeronautics, and/or its representatives pending the establishment of a permanent cost analysis.

Re: U. S. vs. Long
14 Fed. Supp. 29.

2. The initiation of the aforesaid action was not instigated by the particular agency alleged to have been injured or upon which said demand was made.

Re: U. S. vs. White
69 Fed. Supp. 562.

3. The prosecution to date, has failed to allege or show any wrongful purpose, in the presentation of the voucher set forth in the complaint.

Re: U. S. vs. Buckley
49 Fed. Supp. 993.

4. The government has failed to join the corporation and/or its directors as necessary parties.

Calif. Derring's Penal Code 1937
568, 571, 572.

5. The factual material submitted has not conclusively shown that the materials vouchered for were not on order or expected and routinely vouchered for in accord with the practices commonly employed by the agency involved.

U. S. vs. Route
33 Federal 246.

U. S. vs. Stubbs
6 Alaska, 736.

U. S. vs. Dimmick
23 Sup. Ct. 850
189 U. S. 509-47.

Respectfully submitted.

/s/ HAROLD C. WHEELER,
Attorney for Defendant,

111 W. Alameda,
Tucson, Arizona.

Receipt of Copy Acknowledged.

[Endorsed]: Filed November 8, 1949.

In the District Court of the United States
for the District of Arizona

(Tucson Division)

MINUTE ENTRY OF TUESDAY,
FEBRUARY 14, 1950

Honorable Dave W. Ling, U. S. District Judge,
Presiding.

[Title of Cause.]

Defendant's Motion to Dismiss comes on regularly for hearing this day. K. Berry Peterson, Esquire, Assistant U. S. Attorney, is present for the government. Harold C. Wheeler, Esquire, appears on behalf of the defendant. Said motion is now duly argued, and

It Is Ordered that said motion to dismiss be and it is denied.

The defendant is present in person with his counsel, Harold C. Wheeler, Esquire. The defendant is now duly arraigned; the defendant waives reading of the indictment and a copy thereof is handed to him. The defendant's plea is not guilty, which plea is duly entered, and

It Is Ordered that this case be and it is set for trial April 10, 1950, at 10 o'clock a.m.

[Title of District Court and Cause.]

MOTION TO DISMISS

And now comes the defendant, G. Clifford Smith, and moves this Court to quash and dismiss the indictment filed in the above-entitled and numbered case for the following reason:

I. That said indictment is fatally defective on its face, in that it fails to follow the wording and contents of the statute, and further omits the allegations that defendant did, "knowingly and willfully" commit the act or acts alleged.

Wherefore, this defendant prays that said action be dismissed and defendant be discharged from custody and from the indictment herein.

/s/ HAROLD C. WHEELER,
Attorney for Defendant.

Ref. 18 U.S.C. 287, Sec. 1001.

Garrett vs. U. S.,
17 Fed. 2479.

Crowley vs. U. S.,
194 U. S. 461.

Matter of substance and not of form.

[Endorsed]: Filed April 10, 1950.

In the District Court of the United States
for the District of Arizona

(Tucson Division)

MINUTE ENTRY OF MONDAY, APRIL 10, 1950

Honorable Benjamin Harrison, U. S. District Judge, Specially Assigned, Presiding.

This case comes on regularly for trial this day. Frank E. Flynn, Esquire, United States Attorney, appears for the Government. The defendant, G. Clifford Smith, is present in person with his counsel, Harold Wheeler, Esquire. J. D. Ambrose is present as Court Reporter. Both sides announce ready for trial. On motion of Harold Wheeler, Esquire, It Is Ordered that Irving Kipnis, Esquire, be entered as associate counsel for the defendant.

Examination of jurors on voir dire is now had.

A lawful jury of twelve persons is now duly empaneled and sworn to try this case.

And thereupon, at the hour of 2:50 o'clock p.m., It Is Ordered that the further trial of this case be continued to the hour of 9:30 o'clock a.m., April 11, 1950, to which time the jury, being first duly admonished by the Court, the defendant and counsel are excused.

Counsel for defendant now urge Defendant's Motion to Dismiss now filed herein and Motion to Dismiss heretofore filed, and argue the same to the Court.

Whereupon, It Is Ordered that said motions be and they are denied.

In the District Court of the United States
for the District of Arizona

(Tucson Division)

MINUTE ENTRY OF TUESDAY, APRIL 11, 1950

Honorable Benjamin Harrison, U. S. District Judge, Specially Assigned, Presiding.

[Title of Cause.]

The Jury, and all members thereof, the defendant and counsel are present pursuant to recess, and further proceedings of trial are had as follows:

Counsel for the Government waives opening statement to the jury and counsel for the defendant reserve statement.

Government's Case:

Cletus Robbeloth is now sworn and examined on behalf of the Government.

Government's exhibit one, Contract, is now admitted in evidence.

Stephen J. Klich is now sworn and examined on behalf of the Government.

Government's exhibit two, eleven invoices, is now admitted in evidence.

And thereupon, at the hour of 10:10 o'clock a.m., It Is Ordered that the further trial of this case be continued to the hour of 10:25 o'clock a.m., to which time the Jury, being first duly admonished by the Court, the defendant and counsel are excused.

Subsequently, at the hour of 10:25 o'clock a.m.,

the Jury and all members thereof, the defendant and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

Government's Case Continued:

The following Government's exhibits are now admitted in evidence:

3. Certified copy of check.
4. Certified copy of claim.
5. Certified copy of check.
6. Certified copy of claim.

The following Government's witnesses are now sworn and examined:

Wm. P. McConnell,
Lewis W. Koldeway,
Albert L. Thomale,
Antonio V. Bustamante,
Joaquin C. Urbano,
Oscar M. Gomez,
Charles R. Hunt,
George E. Patterson,
Fred W. Streicher.

Whereupon, the Government rests.

The defendant now moves to dismiss this action, and It Is Ordered that said motion be and it is denied.

The jury is now duly admonished by the Court and excused until 1:45 o'clock p.m.

Counsel for the defendant now renews motion to

dismiss, and It Is Ordered that said motion be and it is denied.

And thereupon, at the hour of 12 o'clock noon, It Is Ordered that the further trial of this case be continued to the hour of 1:45 o'clock p.m., this date, to which time the defendant and counsel are excused.

Subsequently, at the hour of 1:45 o'clock p.m., the Jury and all members thereof, the defendant and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

Defendant's Case:

Cletus Robbeloth, heretofore sworn, is now called and examined on the defendant's behalf.

John Patrick Burke is now sworn and examined on behalf of the defendant.

Fred W. Streicher, heretofore sworn, is now called and examined on behalf of the defendant.

Emily Hammes is now sworn and examined on behalf of the defendant.

Charles V. Nevill is now sworn and examined on behalf of the defendant.

The defendant, G. Clifford Smith, is now sworn and examined in his own behalf.

Defendant's Exhibit A, 7 receipts, is now admitted in evidence.

And the defendant rests.

Both sides rest.

All the evidence being in, the case is argued by

respective counsel to the Jury. Whereupon, the Court duly instructs the Jury, and said Jury retire at the hour of 4:15 o'clock p.m. in charge of a sworn bailiff to consider of their verdict.

Subsequently, at 5:05 o'clock p.m., defendant and all counsel being present, the Jury return in a body into open Court and are further instructed by the Court. At 5:10 o'clock p.m., said Jury retire to further consider of their verdict.

Subsequently, the defendant and all counsel being present, the Jury return in a body into open Court at the hour of 5:40 o'clock p.m., and all members thereof being present, are asked if they have agreed upon a verdict. Whereupon, the Foreman reports that they have agreed and presents the following verdict, to wit:

UNITED STATES OF AMERICA,

Plaintiff,

Against

G. CLIFFORD SMITH,

Defendant.

VERDICT

No. C-11697 Tucson

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, to find the defendant, G. Clifford Smith, Guilty as charged in count one of the indictment; Guilty as charged in count two of the indictment.

H. H. MORGAN,
Foreman.

Said Jury recommends leniency.

The verdict is read as recorded, and no poll being desired by either side, the Jury is discharged from the further consideration of this case and excused until Wednesday, April 12, 1950, at the hour of 10:00 o'clock a.m.

And thereupon, It Is Ordered that this case be set for sentence Thursday, April 13, 1950, at the hour of 9:30 o'clock a.m. and referred to the Probation Officer for an investigative report, and that the defendant be allowed to remain on bond herein.

[Title of District Court and Cause.]

No. C-11697 Tucson

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant, G. Clifford Smith, guilty as charged in count one of the indictment; guilty as charged in count two of the indictment.

/s/ H. H. MORGAN,
Foreman.

[Endorsed]: Filed April 11, 1950.

In the District Court of the United States
for the District of Arizona

(Tucson Division)

MINUTE ENTRY OF THURSDAY,
APRIL 13, 1950

Honorable Benjamin Harrison, U. S. District Judge,
Specially Assigned, Presiding.

[Title of Cause.]

This case comes on regularly for sentence this date. The defendant is present with his counsel, Harold Wheeler, Esquire, and is now advised by the Court of his right to make a statement in his own behalf and to present any information in mitigation of punishment. Thereupon, the Court finds that no legal cause appears why judgment should not be now imposed and renders judgment as follows:

No. 11697-Tucson

UNITED STATES OF AMERICA,

Plaintiff,

vs.

G. CLIFFORD SMITH,

Defendant.

On this 13th day of April, 1950, at Tucson, Arizona, came the Attorney for the Government and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and verdict of

guilty of the offense of violating Title 18, United States Code, Section 287, (False claim against Government) as charged in Counts One and Two of the Indictment herein.

The Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant pay a fine of $500.00 on said Count One; that the execution of Judgment on Count One be stayed for a period of 60 days and that if said fine is not paid within said 60 day period, the defendant shall be committed until said fine is paid or he is otherwise discharged by law.

It Is Further Adjudged that the imposition of sentence on Count Two be suspended and that the defendant be placed on probation for a period of three (3) years, on condition that during said period of probation the defendant shall not violate any law of the United States, State, County or City where he resides; that he report to the Probation Officer of this Court at such times and places as said Probation Officer may direct and that he shall not leave the State of Arizona without permission of the Probation Officer and that if he is permitted to leave the

state he shall keep in touch with the Probation Officer.

BEN HARRISON,
United States District Judge.

[Title of Cause.]

It Is Ordered that the bond of the defendant, G. Clifford Smith, be and it is exonerated herein.

In the District Court of the United States
for the District of Arizona

No. 11697-Tucson

UNITED STATES OF AMERICA,
Plaintiff,

vs.

G. CLIFFORD SMITH,
Defendant.

JUDGMENT

On this 13th day of April, 1950, at Tucson, Arizona, came the Attorney for the Government and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and verdict of guilty of the offense of violating Title 18, United States Code, Section 287, (False claim against Government) as charged in Counts One and Two of the Indictment herein.

The Court having asked the defendant whether he has anything to say why judgment should not

be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant pay a fine of $500.00 on said Count One; that the execution of judgment on Count One be stayed for a period of 60 days and that if said fine is not paid within said 60 day period, the defendant shall be committed until said fine is paid or he is otherwise discharged by law.

It Is Further Adjudged that the imposition of sentence on Count Two be suspended and that the defendant be placed on probation for a period of three (3) years, on condition that during said period of probation the defendant shall not violate any law of the United States, State, County or City where he resides; that he report to the Probation Officer of this Court at such times and places as said Probation Officer may direct and that he shall not leave the State of Arizona without permission of the Probation Officer and that if he is permitted to leave the state he shall keep in touch with the Probation Officer.

/s/ BEN HARRISON,
United States District Judge.

[Endorsed]: Filed and Docketed April 13, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant:

G. CLIFFORD SMITH,
2200 East Glenn,
Tucson, Arizona.

Name and address of appellant's attorney:

IRVING KIPNIS,
52 West Alameda,
Tucson, Arizona.

Offense: Violating Title 18 U. S. Code, Section 287 (false claim against Government).

Concise statement of judgment: Judgment dated April 13, 1950:

It was adjudged that defendant is guilty as charged and convicted of the offense of violating Title 18, U. S. Code, Section 287.

It was adjudged that defendant pay a fine of Five Hundred and No/100 ($500.00) Dollars on Count I. (Stay of Execution for sixty (60) days.)

It was further adjudged that enforcement of sentence on Count II be suspended (defendant placed on probation for three (3) years).

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated this 19th day of April, 1950.

/s/ G. CLIFFORD SMITH,
Appellant.

[Endorsed]: Filed April 20, 1950.

[Title of District Court and Cause.]

APPLICATION FOR STAY OF EXECUTION AND RELIEF PENDING REVIEW

Comes Now G. Clifford Smith, by his attorney, Irving Kipnis, and respectfully requests this Court for an order staying execution of that Judgment dated April 13, 1950, in the above-entitled and numbered action, pending appeal.

/s/ IRVING KIPNIS,
Attorney for
G. Clifford Smith.

This application is based upon the following:

Notice of Appeal filed April 20, 1950, pursuant to Rule 37, Rules of Criminal Procedure.

Rule 38, Rules of Criminal Procedure.

Rule 39, Subdivision B(1), Rules of Criminal Procedure.

Receipt of copy acknowledged.

[Endorsed]: Filed April 21, 1950.

In the District Court of the United States
for the District of Arizona

(Tucson Division)

MINUTE ENTRY OF FRIDAY,
APRIL 21, 1950

Honorable Howard C. Speakman, United States District Judge, Presiding.

[Title of Cause.]

It Is Ordered that the defendant herein post bond on appeal sufficient to cover the payment of fine and costs on appeal.

In the District Court of the United States
for the District of Arizona

(Tucson Division)

MINUTE ENTRY OF THURSDAY,
APRIL 27, 1950

Honorable Howard C. Speakman, United States District Judge, Presiding.

[Title of Cause.]

It Is Ordered that the record show that the bond on appeal filed herein on April 21, 1950, has been rejected by the Court for the reason that it is not in compliance with the order of Court therefor entered on April 21, 1950.

It Is Ordered that the bond on appeal in the sum of $750.00 with the United States Fidelity and

Guaranty Company as surety thereon now presented be and it is approved and filed as the bond on appeal herein for payment of fine and costs on appeal.

It Is Further Ordered that defendant's application for stay of execution and relief pending review, heretofore filed herein, be and it is granted.

It appearing to the Court that J. D. Ambrose, Official Court Reporter, U. S. District Court at Los Angeles, California, has requested the file herein be forwarded to him for use in connection with the preparation of the transcript of testimony herein, It Is Ordered that the file be transmitted to the Clerk of the U. S. District Court, Southern District of California, for the use of said court reporter.

———

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents:

That we, G. Clifford Smith, as Principal, and United States Fidelity and Guaranty Company of Baltimore, Maryland, as Surety, do hereby acknowledge ourselves jointly and severally bound to United States of America, Appellee, for payment of the fine and all costs in above entitled suit, not to exceed, however, the sum of Seven Hundred and Fifty Dollars, ($750.00).

Conditioned, However, that the said G. Clifford Smith, Appellant, shall pay the fine and all costs if the appeal is dismissed or the judgment affirmed or

all such costs as the Circuit Court of Appeals may award, up to the full penalty of this bond.

Witness our hands and seals this 20th day of April, A.D. 1950.

/s/ G. CLIFFORD SMITH,
Principal.

UNITED STATES FIDELITY
& GUARANTY COMPANY,

[Seal] By /s/ VIRGINIA BATEY,
Its Attorney in Fact.

[Endorsed]: Filed April 27, 1950.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF RECORD ON APPEAL

To the Clerk of the District Court:

The appellant herein respectfully requests that you prepare and properly certify, for use on appeal in the above-entitled matter, a transcript of the complete record, and all the proceedings, motions, minute entries, orders, reporter's transcript of all the evidence and proceedings, exhibits, and particularly the following, to wit:

1. Record of proceedings before Thomas A. McKay, U. S. Commissioner at Tucson, Commissioner's Docket No. 2, Case No. 594, including the Complaint, Warrant of arrest and temporary commitment of G. Clifford Smith.

2. Indictment.

3. All motions, including the Motion to Quash and the Motion to Dismiss.

4. All orders and minute entries.

5. Reporter's Transcript of evidence and proceedings.

6. Government's Exhibits Nos. 1, 2, 3, 4, 5 and 6.

7. Defendant's Exhibit "A".

8. The Judgment.

Dated this 23rd day of May, 1950.

/s/ IRVING KIPNIS,
Attorney for G. Clifford Smith, Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 23, 1950.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING AND DOCKETING OF RECORD ON APPEAL

Pursuant to Rule 73(g), good cause appearing therefor, it is hereby Ordered that the time for filing and docketing of record on appeal in the above-entitled cause be extended to June 10, 1950.

Dated: May 26, 1950.

/s/ HOWARD C. SPEAKMAN,
Judge, United States District Court, District of Arizona.

[Endorsed]: Filed May 26, 1950.

In the United States District Court,
District of Arizona

No. C-11697-Tucson

Honorable Ben Harrison, Judge Presiding.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

G. CLIFFORD SMITH,
Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff:

FRANK FLYNN, ESQ.,
U. S. District Attorney, and

K. BERRY PETERSON,
Asst. U. S. District Attorney.

For the Defendant:

MESSRS. HAROLD C. WHEELER and IRVING KIPNIS.

Tucson, Arizona, Monday, April 10, 1950, 2 P. M.

(A jury of 12 was duly impanelled and sworn.)

The Court: The balance of the jurors are excused until Wednesday morning at 9:30.

At this time, in the case of United States versus G. Clifford Smith, we are going to take a recess until 9:30 tomorrow morning and the court wishes to admonish you not to discuss this case among yourselves or permit any person to discuss it with you or express or form any opinion whatsoever until the case has been finally submitted to you.

I give this admonition each time realizing that jurors consider it as a formality but experience has taught me that jurors forget it sometimes and the first thing you know they will go out and ask questions about somebody or a certain school as in this case, or something else and the first thing you know they are in a discussion about the case.

I had one case where a juror went out with a real estate dealer to look over the property during the course of a trial involving that property. He made his own observations instead of waiting for the evidence. He did it perfectly innocently. It is easy to unconsciously and innocently discuss a case, particularly when it is being presented to you. I hope you will bear in mind this admonition and take it not as a formality but take it seriously in order that any [3*] verdict that you may render here may be a just verdict and when you leave the courtroom you will feel that you have done your duty, whatever the verdict may be.

With that you are excused until tomorrow morning at 9:30.

Will counsel stipulate the admonition is sufficient

*** Page numbering appearing at top of page of original Reporter's Transcript.**

and need not be repeated at future intermissions?

Mr. Wheeler: Yes.

Mr. Flynn: Yes, your Honor.

The Court: Very well, you are excused until tomorrow morning at 9:30.

(Whereupon, the jury retires from the courtroom.)

The Court: Mr. Flynn, have you looked over counsel's motions?

Mr. Flynn: Yes, your Honor.

The Court: What have you to say?

Mr. Flynn: I don't have a copy of the new criminal rules on pleadings so I can't comment at this time.

The Court: We will take a few minutes recess.

(Short recess.)

The Court: Counsel, where is there anything in this statute that says it shall be knowingly, unlawfully and willfully done?

Mr. Wheeler: The original information, may it please the court, was filed under Title 18, Section 287, subsection [4] 1001.

The Court: But that section has been replaced and the indictment is brought under the new section.

The new section says that "whoever makes or presents to any person or officer in the civil, military or naval service of the United States, or any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined" and so forth.

There is nothing in the statute that says it must be knowingly and willfully committed.

Mr. Wheeler: The original information, may it please the court, was filed under Title 18, Section 287, Subsection 1001.

The Court: But that section has been replaced and the indictment is brought under the new section. The new section says that "whoever shall make or present to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined" and so forth, and it says in the indictment:

> "Said defendant then and there knew the claim to be fraudulent." [5]

That is contained in the body of the indictment.

Mr. Wheeler: Yes, your Honor, I see that. My assumption was he was filing under Subsection 1001 and therein is set forth the necessity of it having been done willfully and knowingly.

Your Honor is possibly familiar with that section:

> "Whoever in any manner within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up——"

The Court: I am familiar with the old section. I was reading it this afternoon to check with this to see the changes.

Mr. Wheeler: The changes have been a little too rapid for some of us to keep up with.

The Court: And as to the other motion.

Mr. Wheeler: There again the terminology, I imagine, should be corrected under the new rules. It should be a motion to dismiss. It used to be a motion to quash.

The Court: You are too late on a motion to quash.

Mr. Wheeler: Not at the time this was filed, your Honor. This motion has been in the court's hands for several months.

The Court: Hasn't the original motion ever been passed on?

Mr. Wheeler: No. [6]

The Court: The one filed November 8.

Mr. Wheeler: No, it has never been passed upon and I submitted today my authorities in support of it.

The Court: Counsel, I think those all have to do with questions of fact that may be developed under this indictment. I have read the cases cited in the motion. I realized you had raised some questions of law and I tried to familiarize myself with them.

For instance the first case you cite is United States versus Long, 14 Fed. Supp. 29. That is a case where a court gave an instructed verdict or judgment of acquittal after the evidence was in. Each one of those have to do with things that developed during the trial.

Mr. Wheeler: That is right.

The Court: And not with the wording of the

indictment. Now, I don't know what the proof is going to be in this case.

Mr. Wheeler: I will concede your attitude is well taken and possibly we jumped the gun in filing the motions.

The Court: I am glad you did because it makes it easier for me to pass on the admissibility of evidence and so forth.

Mr. Wheeler: Would the court consider taking this under advisement and ruling on it later?

The Court: Counsel, if they don't make a prima facie case it won't take long for me to rule on it.

Mr. Wheeler: Very well. [7]

The Court: I will, however, instruct the jury in substance as follows, if they show only that a claim was filed and the claim was false that that is not sufficient. They will have to show that when the defendant filed the claim he had to have knowledge of the falsity of it.

Mr. Wheeler: That was the point I was getting at.

The Court: Of course knowledge is something that the jury has a right to determine from all the circumstances in the case, but if you want to submit to me any proposed instructions along that line, not formula instructions, but instructions on the law of the case I will be glad to consider them.

Mr. Wheeler: Would the court then entertain an instruction concerning the relative value of motive in a situation of this sort in which fraud is alleged? I think it is one of the few cases in which motive and intent——

The Court: I will give an instruction on intent. I think the question of motive is a matter of argument.

I assume it will be your contention in that respect that the defendant signed these papers as an employee of the corporation but received no benefit from the false claim and it was of no advantage to him. That would be an argument against knowledge on his part of the falsity. That is the general principle that you have in mind?

Mr. Wheeler: Yes. [8]

The Court: May I ask counsel if there is any possibility of your going over any documentary evidence you intend to introduce so it may be admitted without argument?

Mr. Wheeler: You mean stipulated to? If we have an opportunity to see it I will be very happy to stipulate to its admission.

The Court: I wouldn't expect you to stipulate to it without seeing it.

Mr. Wheeler: But I have had no opportunity yet.

The Court: Very well. The motions submitted are denied. We will take a recess at this time until 9:30 o'clock tomorrow morning.

(Whereupon, at 3:15 o'clock p. m. a recess was had until 9:30 o'clock a.m., Tuesday, April 11, 1950.) [9]

Tucson, Arizona, Tuesday, April 11, 1950, 9:30 a.m.

The Court: Will you stipulate, gentlemen, the

jurors are all present and in the jury box and the defendant is present in court with his counsel?

Mr. Wheeler: So stipulated.

Mr. Flynn: Yes, your Honor.

The Court: Does counsel for the Government desire to make an opening statement?

Mr. Flynn: No, your Honor.

The Court: Does counsel for the defendant desire to make an opening statement?

Mr. Wheeler: We will reserve our opening statement.

The Court: The Government will call its first witness.

Mr. Peterson: Call Mr. Robbeloth.

CLETUS F. ROBBELOTH

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Cletus F. Robbeloth.

Direct Examination

By Mr. Peterson:

Q. What is your business or occupation, Mr. Robbeloth?

A. I am an employee of the Veterans Administration.

Q. In what capacity? [10]

A. Contract negotiator.

Q. How long have you been there?

A. In that position since July, 1947.

(Testimony of Cletus F. Robbeloth.)

Q. And as such did you negotiate the contract between the Arizona Institute of Aeronautics and the Veterans Administration? A. I did.

Q. Do you have a copy of that contract with you?

A. I have one copy of six, yes, sir.

Q. Do you know the defendant in this case, Clifford Smith? A. I do.

Q. Did he sign that contract?

A. Yes, sir; he signed all six copies.

Q. And you have the one that is retained by the Veterans Administration?

A. That is correct.

Q. Is that a part of the permanent files of the Veterans Administration? A. Yes, sir.

Q. And those are directly under your work and observation? A. That is correct.

Q. Will you produce the contract, please?

A. It is part of the file. Does the court wish me to [11] remove it?

Q. Yes, will you take it out of the file so we can have that separate? A. Yes, sir.

Q. Is that attached to something?

A. It is loose now.

Q. Will you look over those several sheets of the contract and state whether or not that is the contract which was made with the Arizona Institute of Aeronautics? A. It is.

Mr. Peterson: We offer this in evidence, your Honor.

Mr. Wheeler: No objection.

(Testimony of Cletus F. Robbeloth.)

The Court: It will be admitted as Government's Exhibit 1.

(The document referred to was marked Plaintiff's Exhibit No. 1 and received in evidence.)

Q. (By Mr. Peterson): Will you tell me whether or not that contract defined goods to be supplied the students at that school?

A. Yes, this contract——

The Court: Just a moment. Just indicate the part of the contract that indicates that.

Mr. Peterson: It is all a part of the contract, your Honor.

The Court: But point out the particular part. When you [12] ask him if the contract requires certain things you are calling for a conclusion of the witness. The contract is the best evidence. I think the particular portion should be pointed out and should be read to the jury.

The Witness: Shall I proceed?

The Court: Yes.

The Witness: Exhibit C, D and E to the contract list tools which were to be furnished by the school to the veterans in training.

Exhibit C covers the tools to be furnished for a veteran in the air craft mechanic's course and/or the aircraft and engine combined course.

Exhibit D is a list of the tools which would be furnished only to those in the engine-mechanics course.

(Testimony of Cletus F. Robbeloth.)

One list approximately totaled $100.00 and the second and smaller list totaled approximately $75.00.

Q. (By Mr. Peterson): Do you know whether or not the school operated afterwards on that contract?

A. This contract was in effect until July 30th, 1949.

Q. What was the date of the contract—when was it executed?

A. It was executed originally under a memorandum agreement dated January 31, 1949, and the formal contract was completed the 28th of February, 1949.

Mr. Peterson: Cross examine. [13]

Cross-Examination

By Mr. Wheeler:

Q. Cletus, ordinarily there is a provision that the school must be in operation for a year before a contract, a firm contract can be signed, is that not true, with the Veterans Administration?

A. No; that is not a Veteran Administration regulation.

The State of Arizona is the approving agency for schools offering training to veterans. They had a regulation that a school must be in existence at least six months before it could apply for permission to train veterans.

Q. And this was a new school, was it not, Mr. Robbeloth?

(Testimony of Cletus F. Robbeloth.)

A. At the time they began negotiations with the Veterans Administration they were not in existence six months.

Q. Do you of your own knowledge know whether or not this contract had been let more or less on a cost-plus basis?

A. The contract is for furnishing training to veterans and was based on an estimated cost as was done with schools which did not have operating experience.

This school did not have, therefore—the contract was negotiated on an estimated cost basis for tuition.

Q. And the money for tuition could have been vouchered for at any time, could it, Mr. Robbeloth?

A. The money for tuition could be vouchered for in accordance with the terms of the contract after the services [14] were rendered.

Q. Would you tell us what those terms of the contract are?

A. If I may refer to the contract.

Q. With respect to that.

A. The contractor will prepare and certify vouchers for tuition fees and other services at the end—I am leaving out some of this which is not pertinent—at the end of each calendar month for tuition. Any time for books, supplies and equipment after they are furnished or re-issued.

Q. Now, this so-called contractor was the Arizona Institute of Aeronautics, was it not, Mr. Robbeloth?

A. That is correct.

(Testimony of Cletus F. Robbeloth.)

Q. And the vouchers that you received—do you recall them?

A. The vouchers do not come directly to me.

Q. You of your own knowledge would not know then whether or not any direct payments had been made to G. Clifford Smith at any time?

A. I know that vouchers in the name of G. Clifford Smith would not be paid by the Veterans Administration.

Q. In other words, any vouchers to be paid would have to be submitted in the name of the Arizona Institute of Aeronautics—the party with whom you were dealing, is that correct? [15]

A. That is correct.

Q. By any one of their officers—their duly authorized officers?

A. Yes, sir; the person certifying he is authorized to submit a voucher in the name of the corporation.

The Court: May I ask who signed the contract?

The Witness: G. Clifford Smith, director.

The Court: On behalf of the corporation?

The Witness: Yes, sir.

Q. (By Mr. Wheeler): Now, directing your attention, Mr. Robbeloth, to the initial or early days of this school, do you recall any vouchers signed by any other officer of the corporation?

Mr. Peterson: Just a moment. We insist that that should be confined to a time not later than March 18, the date of the charges in this indictment. There might have been other vouchers filed

(Testimony of Cletus F. Robbeloth.)

after all these proceeds took place, but I think the question should be confined to that time.

The Court: I think the objection is good. I think you are wandering away from the subject matter.

The questoin before this jury is whether or not the defendant Smith knowingly filed a false claim with the Veterans Administration, an agency of the United States Government.

Mr. Wheeler: It is our contention, if your Honor please, that the corporation should be the defendant in this matter.

The Court: Well, counsel, you can't send a corporation to jail; you can an individual. The individual is the one who filed the voucher and the one who committed the act. The corporation itself does not file a flase claim. It is the individual who signs on behalf of the corporation.

Mr. Wheeler: I don't want to appear contentious, your Honor,——

The Court: I am just telling you what to confine yourself to.

Mr. Wheeler: Very well. Then the objection to the question as to whether any prior vouchers had been signed——

The Court: We are only interested in these vouchers, counsel.

Q. (By Mr. Wheeler): Now, your organization has a direct relief and direct action in case of overpayment or questionable vouchers, does it not, Mr. Robbeloth?

(Testimony of Cletus F. Robbeloth.)

The Court: That is immaterial. This is a criminal charge.

Q. (By Mr. Wheeler): Do you have a copy of Regulation 10539, Rules and Procedure Manual, M7-5 with you, Mr. Robbeloth?

A. Yes. That is actually two different sets of regulations, but I have the 10539 which is known as Regulations and Procedure. It is not a part of M7-5.

Q. Now, directing your attention to Section F of those regulations, is there not a provision there for billing for [17] supplies and tuition?

A. Not tuition under this section.

Q. Section B and Section F?

A. The Section is entitled "Books, Supplies and Equipment Including Tools."

Q. And what is the provision therein for billing for those, Mr. Robbeloth?

A. Well, its is approximately 10 pages long. I could read it all.

Q. Well, with the permission of the court, to clarify the matter, is there a provision therein to bill at irregular intervals?

A. There are provisions to bill at irregular intervals for supplies which are furnished.

The Court: May I ask a question? Is there a provision for the billing of tools before they are actually furnished?

The Witness: No, sir.

Q. (By Mr. Wheeler): Is there a provision therein that tools and books on order or which have

(Testimony of Cletus F. Robbeloth.)

not been issued, Mr. Robbeloth, are considered to be furnished?

A. Not to my knowledge.

Q. In other words then at this time or at the time these vouchers were signed although those tools had been ordered ——

Mr. Peterson: We object to that. There is no showing that they had been ordered.

Mr. Wheeler: Of course the Government hasn't put on its case yet, your Honor.

Mr. Peterson: You can't ask that question until you have some proof in here that they had been ordered.

The Court: We can go back to the indictment. I don't know what is in those vouchers. I haven't seen them, but the defendant is charged with certifying to certain facts. Now the question is were those facts he certified to knowingly false. That is the real issue.

Q. (By Mr. Wheeler): These regulations which you have there, Mr. Robbeloth, do they serve to control a contract which was entered into with the Arizona Institute of Aeronautics?

A. Yes, sir.

Q. On these schools which had not been in operation—which were operating on an estimated cost-plus basis, which you term the Arizona Institute of Aeronautics. Is there a provision therein for them to estimate the supplies and cost of supplies?

A. The supplies were estimated in the maximum amount in the contract.

(Testimony of Cletus F. Robbeloth.)

Q. You are referring now to the contract and not to the regulations, is that correct?

A. The regulations provide for it also.

Q. The regulations provide for it also? [19]

A. Yes, sir.

Q. In other words, there is provision in the regulations whereby a contractor may estimate the cost of books and supplies and voucher for them?

A. No. The regulation provides that there will be set forth in the contract the actual or estimated cost of the supplies.

Q. And am I correct in your earlier statement in stating that those supplies may be vouchered for at any time during the student's time in school and the tuition itself at the end of the services furnished?

A. Would you please repeat the question?

(Question read.)

The Witness: I believe there is a complexity of thought there between supplies and tuition. Supplies cannot be paid for before they are furnished to the veteran.

Q. (By Mr. Wheeler): Did your organization ever have an audit made of the school, Mr. Robbeloth? A. Yes, we have.

Q. Do you know what comparative analysis there is between the estimated cost as originally furnished by the Arizona Institute of Aeronautics and the actual payment by the Government in the overall picture?

Mr. Peterson: I think that question is imma-

(Testimony of Cletus F. Robbeloth.)

terial, your Honor. It doesn't have anything to do with this charge.

The Court: Objection sustained.

Q. By Mr. Wheeler: You people retained the power at any time, did you not, Mr. Robbeloth, to inspect and supervise these schools?

A. Yes, sir.

Q. And suspend their operations?

A. We did not retain the power to suspend their operations. That is a State right and governed by the Governor's council for veteran training, but they act on the basis of information supplied by us or which they have ascertained in another manner.

Mr. Wheeler: Will counsel stipulate to the introduction of the rules and regulations into the record at this time?

The Court: The court will not permit the introduction of them. We are trying a false claim case.

Mr. Wheeler: Very well, your Honor. That is all at this time. It may be that I will want to recall this witness again.

The Court: Very well. Call your next witness.

Mr. Peterson: Mr. Clich.

STEPHEN J. CLICH

called as a witness by the plaintiff, being first sworn, was examined and testified as follows: [21]

Direct Examination

By Mr. Peterson:

Q. Will you state your name?

A. Stephen J. Clich.

Q. What is your business, Mr. Clich?

A. Credit Manager for Sears Roebuck and Co.

Q. How long have you been there in that position?

A. I was transferred to my present position on June 4 of this last year.

Q. Were you in the position of credit manager during the month of March, 1949?

A. No, sir. I was not here at that time.

Q. Well, were you employed with Sears at that time? A. Yes, sir, I was.

Q. Were you familiar with the orders that were made by the Arizona Institute of Aeronautics?

A. I think I am familiar with the account. I was familiar with it at the time I received the account.

Q. Well, do you know whether you were or not?

A. Sir?

Q. Do you know whether or not you were familiar with the account at that time?

A. Well, it was brought——

The Court: Don't the records speak for themselves, counsel? [22]

Mr. Peterson: Well, I have some documents

(Testimony of Stephen J. Clich.)

here which I want to ask him about and in order to ask him about them I thought I had to lay a foundation.

The Court: If he has the records of the company and he is the custodian of them he may testify regarding them.

Mr. Peterson: It isn't a record of the company. It is a part of the records of the Arizona Institute of Aeronautics which were made by the Sears Roebuck Co. and delivered to them at the time of the delivery of the goods.

The Court: Proceed.

The Witness: Will you repeat the question?

Q. (By Mr. Peterson): Were you familiar with the transactions for the purchase of supplies by the Arizona Institute of Aeronautics in the early part of 1949?

A. At the time I was transferred here it was brought to my attention and I had to pick it up at that time.

Q. When did you come here? A. June 4.

Q. 1949? A. Yes, sir.

A. And do you now have custody of the records of the Sears Roebuck Co.? A. Yes, sir.

Q. Mr. Clich, I will hand you a series of documents, nine of them, attached together and ask you if [23] those are copies of the records of the purchases made by the Arizona School of Aeronautics as shown by the books of the Sears Roebuck Co.?

A. May I compare them with my records?

The Court: Certainly.

(Testimony of Stephen J. Clich.)

Q. (By Mr. Peterson): Have you compared them recently? Did you compare them recently?

A. Yes, sir, I have.

Q. Well, you may compare them again.

A. Juror: Your Honor, I have good ears but it is pretty hard to hear Mr. Peterson.

Mr. Peterson: I am sorry my voice is not stronger but I haven't been very well. I will attempt to speak more directly this way.

The Court: It doesn't do any good to ask a question if the jury doesn't hear it.

The Witness: I find these records that have been presented to me to be exactly as I have them on my accounts, sir.

Mr. Wheeler: May I ask a question on voir dire, your Honor? The Court: Yes.

Voir Dire Examination

By Mr. Wheeler:

A. Are these all the records you have, Mr. Clich. I am referring to records relative to the transactions [24] with the Arizona Institute of Aeronautics.

A. There were other records, sir, pertaining to orders at the time I had the account but they were all cancelled off of the account. These are the orders that were delivered to the customer.

Q. You are not familiar with the original orders or by whom they were ordered?

A. They were all ordered by the Arizona Insti-

(Testimony of Stephen J. Clich.)

tute of Aeronautics. I could not tell you the party who ordered them.

Q. Do you have any orders prior to February 24? I think that is the date on the first bill here.

A. There were two orders, one on February 12 and one on February 17, sir.

Q. Then this record does not comprise the entire record of Sears Roebuck and Co. as far as the Arizona Institute of Aeronautics is concerned?

A. That is their record, sir. My record shows two other orders.

Mr. Wheeler: We object to a partial introduction of the documentary evidence, your Honor.

Mr. Peterson: I haven't offered it yet.

Mr. Wheeler: I presume that is the purpose of it.

The Court: What is that?

Mr. Peterson: I haven't offered it yet.

Mr. Wheeler: Very well, we will withdraw our objection [25] then.

The Court: They should be marked for identification, counsel.

Mr. Peterson: Yes. Will you mark these, Mr. Clerk?

The Clerk: Government's Exhibit No. 2 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 2 for identification.)

The Court: Counsel asked you about two orders prior to the date you mentioned. What does your record show as to those orders?

(Testimony of Stephen J. Clich.)

The Witness: Sir, it shows a record or a sale on February 12 in the amount of $68.43 and on February 17 of $86.35.

Direct Examination
(Continued)

By Mr. Peterson:

Q. Is that contained in these documents?

A. It should be there, sir. That is their record. I do not have anything to do with it.

The Court: What do you mean by "their records"?

The Witness: Well, sir, they received that copy. That is the customer's copy which they received at the time the merchandise was delivered. I have no control over that.

The Court: You have copies or the originals of those?

The Witness: I have my copies, sir.

The Court: Of the 17th and 22nd?

The Witness: Yes, sir. [26]

The Court: Why not produce those?

Mr. Peterson: No objection.

The Court: They are the originals. The witness is in court and under my direction. We will make this record complete so you will have them all in evidence.

Mr. Wheeler: Very well, your Honor.

The Court: You have no objection to the fact that these are carbon copies and this witness retaining the originals?

(Testimony of Stephen J. Clich.)

Mr. Wheeler: No, your Honor.

The Court: Then they may be made a part of the last exhibit for identification.

Mr. Peterson: Yes.

The Court: Will you hand them to the clerk?

Those additions complete the transactions of actual deliveries, is that right?

The Witness: That is right.

The Court: Let them be marked together with the last exhibit. You may proceed. Any further questions?

Q. (By Mr. Peterson:) That is all of the records which you have showing supplies furnished to the Arizona Institute of Aeronautics before March 18, 1949?

A. As I explained before, sir, there were a number of other orders which were cancelled out and which the Arizona Institute of Aeronautics did not receive and these records that I have are only on the merchandise that they received [27] from our company.

Q. And that was before March 18, 1949?

A. That is right, sir.

The Court: This says March 25, does it not?

Mr. Peterson: It covers it anyhow.

The Court: Yes.

Mr. Peterson: We offer the document in evidence at this time.

The Court: It will be admitted. Is there any objection?

Mr. Wheeler: No objection.

The Clerk: Government's Exhibit 2 in evidence.

(Testimony of Stephen J. Clich.)

(The document referred to was marked Plaintiff's Exhibit No. 2 and received in evidence.)

Mr. Peterson: That is all.

The Court: You may cross examine.

Cross-Examination

By Mr. Wheeler:

Q. Do the cancellations there show by whom they were made, Mr. Clich?

A. The orders, sir?

Q. Yes, the orders that were cancelled?

A. I do not have those orders, sir, inasmuch as they are part of our——

Q. Would the orders proper have the signatures of [28] the individuals by whom they were ordered, representing the corporation, or would you know that detail?

A. My orders show, sir, that the orders were submitted by the Arizona Institute of Aeronautics and the authorized agent was Mr. G. Clifford Smith.

Q. Throughout this period of time?

A. Yes, sir.

Q. And by whom were they cancelled? Does that show the orders that were not delivered?

A. They were ordered cancelled by my auditors, sir.

Q. You don't know by whose authority prior to that? A. No, sir.

(Testimony of Stephen J. Clich.)

Mr. Wheeler: That is all at this time, your Honor.

The Court: May this witness be excused?

Mr. Wheeler: I think with Mr. Clich's permission we can give him 15 minutes or a half hour notice and I will ask that he be subject to recall later on, your Honor, if that is agreeable?

The Court: You are located right here in Tucson? The Witness: Yes, sir.

The Court: And if you get a telephone call you will respond immediately?

The Witness: Yes, sir.

The Court: Then you may be excused until notified to appear. [29]

Call your next witness.

Mr. Peterson: Your Honor, I have some exhibits which just came out of Washington and I haven't had an opportunity to look at them and neither has Mr. Flynn. They were supposed to have been here at least two days.

May we have a short recess so I can look them over and show them to counsel?

The Court: They are certified copies?

Mr. Peterson: Yes. I haven't looked them over myself to see what condition they are in.

The Court: How long a recess do you want?

Mr. Peterson: About 15 minutes. I would like to have Mr. Flynn look at them also.

The Court: Very well. Ladies and gentlemen, you have heard the reason for the intermission. We will take a recess of 15 minutes at this time and you

will bear in mind the admonition the court has heretofore given.

(Whereupon a short recess was had.)

The Court: Will you stipulate, gentlemen, the jurors are present and in the jury box and the defendant is in court with his counsel?

Mr. Wheeler: So Stipulated.

Mr. Peterson: Yes, your Honor.

The Court: You may proceed.

Mr. Peterson: May I have these [30] documents marked for identification, please?

The Clerk: Government's Exhibits 3 and 4 for identification.

(The documents referred to were marked Plaintiff's Exhibits 3 and 4 for identification.)

Mr. Peterson: May I also have these two documents marked for identification?

The Clerk: Plaintiff's Exhibits 4 and 5—Plaintiff's Exhibits 5 and 6 marked for identification.

Mr. Peterson: Your Honor, at this time I have shown Mr. Wheeler and counsel for the defense Government's Exhibits 3 and 4 and 5 and 6. They are certified copies of the record.

The Court: Any objection to their admission?

Mr. Wheeler: No objection, your Honor.

The Court: Do you have objection to any of them?

Mr. Wheeler: They may all go in.

The Court: They will be admitted.

(The documents referred to were marked Plaintiff's Exhibits 3, 4, 5 and 6 and received in evidence.)

The Court: I think a statement should be made as to what they are.

Mr. Peterson: I might state they are copies of the records.

The Court: What records? Are they records pertaining to this case, so the jury will know what we are talking about? [31]

Mr. Peterson: I want to show them to the jury and I will explain to them now what they are.

Exhibit 4 is a certified copy of the claim filed on the 18th day of March, 1949, by the Arizona Institute of Aeronautics and signed by G. Clifford Smith, the defendant in this case.

Mr. Wheeler: Will counsel state the amount?

Mr. Peterson: It is for $700 plus $70 allowed by the Government for handling charges and less a discount of 2 per cent, making the total payment $754.60.

The Court: Pass that exhibit to the jury, please.

Mr. Peterson: That is Exhibit 4.

Exhibit 3 is the check paid by the Treasurer of the United States on March 31, 1949 in the amount of $754.60 and endorsed by G. C. Smith.

Exhibit 6 is a claim filed by G. Clifford Smith in the amount of $300 plus $30, 10 per cent for original handling, less a discount of 2 per cent, making a total payment of $332.40.

The Court: Was that filed by the school or by Mr. Smith?

Mr. Peterson: It is signed by the Arizona Institute of Aeronautics by G. Clifford Smith, director.

A check was sent on April 21st—I don't think this is particularly material, but it was sent to the Arizona Institute of Aeronautics endorsed by another director whose name I am unable to make out on this document. [32]

The Court: You will pass those to the jury.

Mr. Peterson: Yes.

The Court: You may proceed.

Mr. Peterson: Mr. McConnell, will you take the stand.

WILLIAM P. McCONNELL,

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. Will you state your full name?

A. William P. McConnell.

Q. And what is your business, Mr. McConnell?

A. I am chief instructor of the Arizona Institute of Aeronautics.

Q. When did you first accept that position?

A. The latter part of October, 1948.

Q. And you have been continually with the school from that time on? A. Yes, sir.

Q. Are you familiar with the list of tools which were to be supplied to the students at this school?

(Testimony of William P. McConnell.)

A. Yes, sir.

Q. Who made up that list?

A. The list was a copy of a similar list I had used in Philadelphia in a similar school and [33] I thought it would be—they had been already used with success and I just used the same list for this school.

Q. Do you know what the value of those tools was?

A. They were listed at $75.00 for a complete set.

Q. Those were the tools to be delivered to each student? A. That is right.

Q. Did you know the value of the books which were to be delivered to each student?

A. The amount of books that were to be delivered to each student was listed at just under $25.00. I forget the exact amount.

Q. Were you employed there during March of 1949? A. Yes, sir.

Q. Were you present when Sears Roebuck and Co. furnished 45 kits of tools to the students at the Arizona Institute of Aeronautics?

A. So much time has elapsed since that time that I have——

Q. You may recall making a statement on the 19th day of May, 1949?

A. Yes, sir. I have a copy of it.

Q. May I hand this to you and refresh your memory from it and ask you if that is your signature on that document?

(Testimony of William P. McConnell.)

A. Furnished 45 kits of tools, each kit valued at [34] $58.85. Yes, sir, that is true.

Q. Do you know whether or not those students ever received the balance of those tools up to the amount of $75.00? A. Yes, sir, they did.

Q. Was that before or after this defendant left?

A. That was after.

Q. He was no longer in charge as a director out there? A. That is right, sir.

Q. When these tools were furnished?

A. Yes, sir.

Q. In March, 1949?

The Court: When was the balance furnished?

The Witness: It was along in the latter part of April, 1949, sir.

The Court: That was after the complaints had come in?

The Witness: The exact date could be obtained from the Arizona Welding Company who furnished the balance of the tools. I think Mr. Moore has those.

Q. (By Mr. Peterson): Those were the last tools that were furnished? A. Yes, sir.

Q. And that was after, you stated, that this defendant had left? A. Yes, sir. [35]

Mr. Peterson: Cross examine.

Cross-Examination

By Mr. Wheeler:

Q. Mack, by whom were these last tools ordered, do you recall?

(Testimony of William P. McConnell.)

A. They were ordered by the then president of the corporation, if my memory is correct, Mr. John Wiley.

Q. Mr. John Wiley? A. Yes, sir.

Q. And do you know when he ordered them?

A. That I couldn't say. I couldn't give the exact date. It was the latter part of April if I remember correctly. However, the school records should show exactly when they were ordered. I didn't order them.

Q. You didn't order them yourself?

A. No, sir.

Q. Now this first 45 sets—kits of tools amounting to approximately $60.00—$58.85, they had been ordered by Smith when he was in there as a director, is that right? A. That is right.

Q. Who had control of the issuance of those tools, Mack?

A. The issuance of the tools was entrusted to the then vice-president of the corporation, Mr. Fred Streicher.

Q. Fred Streicher? A. Yes, sir. [36]

Q. And do you know whether Fred Streicher issued all of the tools that came in or not, to your own knowledge?

A. As far as I know he issued all the tools that came in at that time—not all of the tools, but the $58.85 worth of tools.

Q. Did he keep those tools locked up before issuance?

A. They were locked in his office at night.

(Testimony of William P. McConnell.)

Q. They were locked in his office at night?

A. That is right.

Q. Smith had no control over the tools?

A. Well, the duty as I said of issuing the tools was with Mr. Streicher. He was given that duty.

Q. And did Mr. Streicher also have control of the issuance of the books? A. Yes, sir.

Q. Do you recall, Mr. McConnell, when this case was under investigation that the post office at that time had some books ready for delivery and had notified your company?

A. No, sir, I do not.

Q. You don't recall that? A. No, sir.

Q. Tools were pretty difficult to obtain during that period of time, were they not?

The Court: What was the question? [37]

Q. (By Mr. Wheeler): Tools were pretty difficult to obtain during that time?

The Court: In March, 1949?

Mr. Wheeler: Yes, your Honor, specialized tools.

Mr. Peterson: I object to that.

The Court: If this witness knows he may answer the question. I think most of us know by common knowledge that tools were not hard to obtain at that time. Did you have trouble getting tools?

The Witness: When we ordered from Arizona Welding we were able to get the tools in a short time.

Q. (By Mr. Wheeler): That was Arizona Welding? A. Yes, sir.

The Court: When you discovered there was a

(Testimony of William P. McConnell.)

shortage in the delivery of tools you didn't have trouble getting the necessary tools to make up the difference, did you? The Witness: No, sir.

Q. (By Mr. Wheeler): Do you know from whom they were ordered, Mack?

A. They were ordered from the Arizona Welding, which is a Tucson corporation. They were ordered through their salesman. I disremember his name.

Q. You don't know whether they had them in stock or whether they had to send off for them or anything of that sort? [38]

A. No, I do not. The headquarters of the company is at Phoenix and they were brought down from Phoenix.

Q. Pardon me?

A. I understood they were brought right down from Phoenix.

Q. In other words, they had to get them out of Phoenix?

A. That is right. That is my understanding, sir, of where they came from.

Q. The original orders went through Sears Roebuck, didn't they, Mack?

A. The order for the original tools?

Q. Yes.

A. Went through Sears Roebuck and Co., yes.

Q. Do you know by whom those orders were cancelled? A. I do not.

Q. You don't know who cancelled those orders?

A. No, sir.

(Testimony of William P. McConnell.)

Q. Do you know for what reason?

A. No sir, I do not. Any knowledge I have on that would be hearsay and I don't wish to state it.

The Court: Did you have a purchasing agent out there?

The Witness: At that time the purchasing of equipment was done mostly by Mr. Smith.

Mr. Wheeler: Are you through, your Honor?

The Court: Yes. [39]

Q. (By Mr. Wheeler): You say mostly by Mr. Smith, Mr. McConnell. By whom else was the purchasing done?

A. On large items it was all done by Mr. Smith. On small items, say for instance I needed some little equipment or say the girls needed some stamps or something like that they got them themselves.

Q. You got them yourself? A. Yes, sir.

Q. Did Mr. Streicher purchase any large equipment? A. Prior to March 18?

Q. Yes. A. Yes, sir.

Q. And he vouched for it, did he not, Mr. Mack?

A. No, sir, not that I know of. I mean ——what I am getting at is prior to March 18 while the school was being organized, both Mr. Streicher and myself made several trips up through Northern Arizona obtaining aeronautical equipment. We bought that equipment but it was okayed when we returned by Mr. Smith.

Q. You bought it in the name of the Institute, did you?

(Testimony of William P. McConnell.)

A. The corporation, but it was subject to Mr. Smith's okay.

Q. Now, diverting your attention again to this first kit of tools—you spoke of these [40] 45 kits. I believe you stated Mr. Streicher was in charge of the issuance of those tools?

A. That is right, sir.

Q. Do you know whether he obtained any type of receipt from the students when he issued those tools? A. Yes, sir; a receipt was signed.

Q. A receipt was signed by each student, was it, Mr. McConnell?

A. That is my understanding, yes, sir.

Q. And to whom then did he turn those receipts over to, Mack?

A. That I do not know.

Q. In other words, Smith himself had no control over the issuance of the tools. That is what I am driving at. Do you follow what I am driving at? Did Smith actually get out and put those tools out to the students or were they put out through a third party or parties, namely Fred Streicher or yourself, Mack?

A. The tools were actually, as I say, issued by Mr. Streicher. However, Mr. Smith was familiar with the contents of the tool boxes I feel sure.

Q. And then the receipts from the students were given back to Mr. Smith for vouchering, is that correct?

A. I do not know. I don't know where they went.

(Testimony of William P. McConnell.)

Q. And of course you know nothing about [41] the internal frictions or workings or anything else of the corporation at that time, Mack?

A. Very little, sir.

Q. Were the officers of the institute all in harmony and did each one know what was happening?

Mr. Peterson: We object to that. This witness can't answer that question.

The Court: The objection is sustained.

Mr. Wheeler: I believe that is all at this time, your Honor.

The Court: Any further questions of this witness? Mr. Peterson: No.

Mr. Wheeler: Just one other question if we may.

Q. (By Mr. Wheeler): Were you at any time present when an order was put through Sears and Roebuck, Mack, for $75.00 worth of tools?

A. Was I present when the order was put in at Sears and Roebuck?

Q. Yes. A. No, sir.

Q. Don't you recall being present with Smith at Sears Roebuck when the order was put through?

A. No, sir.

Mr. Wheeler: That is all at this time, I believe.

Mr. Peterson: That is all. [42]

The Court: Call your next witness.

Mr. Peterson: Call Mr. Lewis Koldewey.

LEWIS W. KOLDEWEY

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. What is your name, please?

A. Lewis W. Koldewey.

Q. What is your business, Mr. Koldewey?

A. I am a special agent of the Federal Bureau of Investigation.

Q. And what particular class of work do you do? A. General criminal investigation.

Q. Auditing also?

A. Some if it appears on an investigative case.

Q. Did you make an investigation into the charges against this defendant on or about May 19 of 1949? A. That is right, I did.

Q. Did you investigate some of the students who were out there at that time?

A. Well, I interviewed those boys, yes. That was the extent of my investigation.

Mr. Peterson: I would like to ask that these documents be marked separately for identification.

The Court: What are they, may I ask?

Mr. Peterson: They are statements made before Mr. Koldewey as a member of the Department of Justice, by the boys, stating the tools which they did not receive.

The Court: Students?

(Testimony of Lewis W. Koldewey.)

Mr. Peterson: Yes, tools they had not received up to as late as May, 1949.

The Court: Statements made by the students to this witness?

Mr. Peterson: Yes.

The Court: They would not be admissible.

Mr. Peterson: Well, I have these students here whom I will put on later.

The Court: You may put the students on but I don't think the statements made to this witness are binding upon this defendant.

Mr. Peterson: I merely want to identify them at this time.

The Court: You may have them marked for identification. There is no objection to that.

The Clerk: Marked separately, Mr. Peterson?

Mr. Peterson: Yes, separately.

The Clerk: Marked Government's Exhibits 7, 8, 9, 10, 11, and 12 for identification.

(The documents referred to were marked Plaintiff's Exhibits 7, 8, 9, 10, 11, and 12 for identification.) [44]

Q. (By Mr. Peterson): Did you make any investigation as to the cost of the tools actually distributed to either or any of those students at that time? A. Yes, I did.

Q. How did you arrive at the value of those tools?

A. I had the school's copy of the contract and this contract had as a supplement a listing of what

(Testimony of Lewis W. Koldewey.)

every student was to have in the way of books and tools.

Each tool was listed separately and had an estimated cost; and the same way with the books for the course pursued by each student.

Then I interviewed each one of these students who had been listed on this voucher.

Q. Let us not refer to the voucher.

A. And found from them——

The Court: Just a moment. That is a conclusion on your part. Why don't you ask him what you are driving at, counsel?

Q. (By Mr. Peterson): Did you make any investigation as to the cost of the tools actually given to the students whom you interviewed at the school?

A. Yes, sir.

Q. And what was the cost per student?

A. Approximately $58.58.

Q. Did you make any investigation as to [45] the cost of the books which had actually been distributed? A. Yes, sir, I did.

Q. You know the defendant here, don't you?

A. I do.

Q. Did you have any conversation with him along in May of 1949?

A. I did, yes. I interviewed him.

Q. Where did the conversation take place?

A. At the Pima County Jail.

Q. And who were present?

A. Merely he and I.

Q. What time of the day was it?

(Testimony of Lewis W. Koldewey.)

A. It was from a little before 3:00 in the afternoon to about 3:15 in the afternoon of May 25, 1949.

Q. Did you have any conversation relative to the vouchers which he had filed?

A. I did.

Q. What did he state?

A. He stated that this was a voucher which he had submitted and we asked whether or not he had signed it. He stated he had signed it. We asked regarding the amount of books and tools furnished each student. The defendant, G. Clifford Smith, stated he knew approximately $50.00 worth of tools and books had been furnished each student at the time he had vouchered for the amount. [46]

Q. I will hand you Government's Exhibit 4 and ask you if you ever saw that document or a copy of it?

A. Yes; I saw the signed copy which had been given me to investigate.

Q. When you had that conversation was that the voucher you were asking him about?

A. That is right, that is the voucher which I had.

The Court: Did you show him only the one voucher?

The Witness: That is right. I merely showed him one voucher.

Mr. Peterson: Cross-examine.

(Testimony of Lewis W. Koldewey.)

Cross-Examination

By Mr. Wheeler:

Q. Mr. Koldewey, did you check back through the vouchers to determine what the Arizona School of Aeronautics or Institute of Aeronautics, had vouchered for since the beginning?

A. I did not.

Q. And you of your own knowledge don't know whether there were any prior vouchers submitted or not, do you, nor by whom? A. I do not.

Q. Did you have specific instructions to restrict your investigation to a certain specific period of the school's operation or not?

A. I was given this voucher and was requested to [47] investigate the voucher which I had received.

Q. That is this voucher 4——

A. March 18 voucher.

Q. March 18 voucher? A. Yes, sir.

Q. The one signed by Mr. Smith as director of the Arizona Institute of Aeronautics and countersigned by H. K. Thomas, is that correct, or H. R. Thomas? A. Yes, sir.

Q. This is the one to which you refer?

A. Yes, sir, March 18, that is right.

Q. And during this conversation that was alluded to were you told by Mr. Smith that the balance of the tools would be in and issued?

A. I was not.

(Testimony of Lewis W. Koldewey.)

Q. Are you quite sure of that or don't you recall it?

A. I am quite certain because it was qualified after he had told me that he hadn't. It was his knowledge that he hadn't furnished those and we questioned him why was it—why had not $100.00 in tools and books been furnished at that time and he stated he had been given permission to voucher for the full amount.

Q. That is what I am getting at, Mr. Koldewey. He had been given permission to voucher for it, is that correct?

A. That is what Mr. Smith told me. [48]

Q. Pending the obtaining of the balance of the tools, was that it?

A. No. He said he had been given permission to do this by Mr. Burke of the Veterans Administration.

The Court: Who is Mr. Burke?

Mr. Peterson: He is a witness here, your Honor.

Q. (By Mr. Wheeler): Did you check that statement with Mr. Burke, Mr. Koldewey?

A. Yes; I interviewed Mr. Burke.

Q. Now, in your contact with each one of these students listed on this voucher did you ask them if they had signed a receipt acknowledging acceptance of these tools? A. I did not.

Q. Did you investigate to determine whom had the possession and obligation for the issuance of tools at the Arizona Institute of Aeronautics?

(Testimony of Lewis W. Koldewey.)

A. That would be a hearsay statement. I was told that.

The Court: Let us not have any hearsay. We have enough of it so far without any more.

Q. (By Mr. Wheeler): In other words, you didn't make an investigation as to that responsibility?

A. Not beyond that point, and again that is hearsay.

Mr. Wheeler: I believe that is all at this time subject to recall, your Honor.

The Court: Call your next witness. [49]

Mr. Peterson: Mr. Albert Thomale.

ALBERT L. THOMALE

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. What is your name, please?

A. Albert L. Thomale.

The Court: It isn't Tomale?

The Witness: No, sir.

Q. (By Mr. Peterson): Where do you reside, Mr. Thomale? A. 4136 Santa Barbara.

Q. Have you ever been a student in the Arizona Institute of Aeronautics? A. Yes.

Q. How long have you been with them?

(Testimony of Albert L. Thomale.)

A. I started January 31 of 1949 and I quit in the last of 1950.

The Court: When?

The Witness: Wait a minute, the last of 1949. December of 1949.

Q. (By Mr. Peterson): Do you know Mr. Lewis W. Koldewey from the Federal Bureau of Investigation? A. Yes, sir; I have met him.

Q. Did he interview you sometime in May of this year? [50] A. You mean last year?

Q. Last year I mean.

A. I don't remember the date, but I know he interviewed me.

Q. I will hand you Government's Exhibit——

Mr. Wheeler: I object to that.

The Court: Let us determine whether he needs to have his memory refreshed. He knows what he received, doesn't he?

Q. (By Mr. Peterson): You knew when you were a student there you were to get a certain list of tools? A. That is right.

Q. Did you ever get all of those tools?

A. Yes, sir, I got them all now.

Q. But before March 18 or March 25, 1949, had you received all the tools that you were supposed to get there at the school? A. No.

Q. Did you receive all the books that you were supposed to receive? A. No.

Q. You received them later on in the year?

A. That is right.

(Testimony of Albert L. Thomale.)

Q. Was that after this man, this defendant, Mr. Smith, left the school? A. Yes. [51]

Mr. Peterson: That is all.

Cross-Examination

By Mr. Wheeler:

Q. Albert, several others had left the school at that time, too, hadn't they? I mean of the original directors and officers, prior to March 18?

A. Several others had left. You mean the officers?

Q. Yes.

A. I don't know who you are referring to. I don't recall now.

Q. The only one you recall is Mr. Smith?

A. Yes.

Q. Now, Albert, who issued these tools to you? Did Mr. Smith issue them to you?

A. No; it was Fred Streicher.

Q. And when they were issued did you give him a receipt for the issuance of those tools?

A. Yes, sir; I believe I did sign a receipt.

Q. You signed a receipt. Now, I don't have the statement to refresh your memory with, but do you recall what that receipt was for?

A. It was for the tools.

Q. For how much? $75.00 worth of tools?

A. Well, I never knew the price of them. We just had the list of tools. That is all we were signing. [52]

(Testimony of Albert L. Thomale.)

Q. And Mr. Streicher had you sign a receipt for these tools, is that correct?

A. That is right.

The Court: For all of them? Did you sign a receipt for all of them?

The Witness: I believe it was for the entire amount and he said we would get the rest later.

Q. (By Mr. Wheeler): Do you know whether or not, Albert, Streicher was an officer of this so-called Arizona Institute of Aeronautics at that time? A. I guess he was.

Q. Did he continue to so serve? A. No.

Q. Then there was one other person beside Mr. Smith who changed occupations out there, is that correct? A. That is right.

Q. You don't know where these receipts went that you signed or this receipt, to whom it was turned over to or what proceeding it went through?

A. I believe mine was in my record. I don't know. I may be mistaken, but I thought I seen mine in my record. After I quit school *I looking* through my record.

Q. Albert, does this course of instruction require some specialized tools? A. Yes, sure. [53]

Q. Were those tools at that time difficult to obtain, if you know?

Mr. Peterson: I object to that question.

The Court: Let him answer the question.

Mr. Peterson: The main thing in this suit, your Honor, is the fact that—suppose they were hard to get. He billed the Government for this stuff with-

(Testimony of Albert L. Thomale.)

out ever having delivered it and that is the violation.

The Court: I realize that and the jury has been so instructed, but this witness signed a receipt for all the tools and let us find out the circumstances.

I think it is a matter of common knowledge that tools were not difficult to obtain. I think I can almost take judicial notice of the fact that tools were not difficult to obtain in 1949, so you may ask the witness the question if he knows.

The Witness: I don't know.

Q. (By Mr. Wheeler): Was the issuance of these tools and books over a period of time or did you receive one bunch at one time and that was all, Albert?

A. Yes, we received most of them in one big bunch.

Q. As soon as you signed up for the course of instruction? A. No, no.

Mr. Wheeler: I believe that is all. [54]

The Court: I want to clarify his testimony. As I understand you were issued a portion of the tools prior to March 18 and afterwards you received the balance of them?

The Witness: That is right.

The Court: Was that after a change had taken place out there?

The Witness: That is right.

The Court: Was that due to any complaint that you had made? Had you complained about the fact that you had not received all your tools?

(Testimony of Albert L. Thomale.)

The Witness: Not myself personally, no.

The Court: And then after Mr. Smith and Mr. Streicher left you received the balance of your tools?

The Witness: That is right.

The Court: That is all.

Mr. Peterson: That is all.

The Court: Call your next witness.

Mr. Peterson: Call Mr. Bustamente.

ANTONIO V. BUSTAMENTE

a witness called by the plaintiff, being first sworn, was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. Will you state your full name, please? [55]

A. Antonio Bustamente.

The Court: You will have to speak up.

Q. (By Mr. Peterson): Where do you live?

A. 150 West Kennedy.

The Court: You are not doing a very good job of speaking up.

Q. (By Mr. Peterson): Were you ever a student in the Arizona Institute of Aeronautics?

A. I was.

Q. Were you a student there——

The Court: Can the jury hear the witness?

A Juror: Yes, we can hear him.

Q. (By Mr. Peterson): Were you a student

(Testimony of Antonio V. Bustamente.)

there during the months of February and March of 1949? A. I was.

Q. Did you receive some tools from that institution?

A. Yes, sir; I received some tools, but up to March 18 I hadn't received them all.

Q. Did you later on receive them?

A. I did.

Q. Was that after Mr. Smith left the institution? A. Yes, sir.

The Court: How did you come to receive the balance of them? What did you do? Did you do anything about it?

The Witness: No, not personally. [56]

Mr. Peterson: That is all.

Cross-Examination

By Mr. Wheeler:

Q. Antonio, did you ever sign a receipt for these tools? A. I believe I did.

Q. And by whom was that receipt tendered to you? I mean who gave you this receipt to sign?

A. Mr. Streicher.

Q. Was he an officer of this Arizona Institute of Aeronautics? A. I believe he was.

Q. Now, you said you hadn't received all of the tools. What tools had you failed to receive up to March 18 of last year?

A. Well, I don't recall the tools I hadn't re-

(Testimony of Antonio V. Bustamente.)

ceived, but I have made a statement of the tools I hadn't received up to that date.

The Court: Would the statement refresh your memory?

The Witness: I think it would.

Q. (By Mr. Peterson): Government's Exhibit 10. Is that your signature? A. Yes, sir, it is.

Q. That is the statement you made to Mr. Koldewey? A. I did. [57]

Q. You don't have a copy of the receipt you signed for Mr. Streicher? A. No, I don't.

Q. You don't know what was written on it then?

A. Well, the receipt listed all the tools and I think it stated we were supposed to receive $25.00 worth of books and then we just signed it over and handed it to Mr. Streicher.

Q. Do you know whether the tools that are listed here were included on that list?

A. Yes, they were.

Q. They were included? A. They were.

Q. A punch and file—a couple of files. Do you know the value of the tools, Antonio?

A. No, I don't.

Q. You never had to buy any since you graduated out there and started working as a mechanic? A. No, I haven't.

Q. Did you at any time lack for tools, Mr. Bustamente, during your schooling out there?

A. Will you repeat the question?

Q. Did you at any time ever lack for tools during your schooling out there?

(Testimony of Antonio V. Bustamente.)

Mr. Peterson: We object to that. That isn't the question. [58]

The Court: Objection sustained.

Mr. Wheeler: No further questions at this time.

Redirect Examination

By Mr. Peterson:

Q. This statement that you made and in which you were questioned by Mr. Wheeler, does that include the tools you did not receive?

A. Yes, sir.

Q. This statement that you have here does that include the tools that you did not receive until after Mr. Smith left is what I mean?

A. That is right. These are the tools I had not received.

Q. Had you received any books before Mr. Smith departed?

A. Yes. We received one notebook and a manual—manual No. 18, I think. I am not sure.

Mr. Peterson: I am going to offer this exhibit in evidence.

The Court: I don't think it is admissible.

Mr. Wheeler: I object to it.

The Court: He may refresh his memory from it and testify if it does refresh his memory, but I don't think the statement itself is admissible.

Mr. Peterson: He was questioned about it by counsel [59] for the defense at great length and

(Testimony of Antonio V. Bustamente.)

that questioning was not for the purpose of refreshing his memory.

The Court: He didn't follow it up. You may follow it up if you want. You may ask him from that statement if he can refresh his memory as to what tools were not furnished him and then he can testify as to what were not.

Q. (By Mr. Peterson): Will you refresh your memory from that and testify to the jury here and state what tools you did not receive?

A. Well, the tools I had not received was a center punch, size C; a file, a 10-inch file, a half-round, round, smooth—a file, 10-inch flat. One rawhide mallet. A pair of welding goggles. A pair of pliers, No. 356. One cold chisel, half-inch. One steel rule, 6 inch. One general protractor. Two C-clamps, 2 inch. Two C-clamps, 3 inch.

Q. That is all?

A. Those are the tools I had not received.

Q. Did you list any books on that?

A. As of March 18, 1949, the only books in my possession was a C. A. Manual 18.

Q. What?

A. A C. A. R. and a looseleaf notebook given by the school.

Mr. Peterson: That is all. [60]

Recross-Examination

By Mr. Wheeler:

Q. You said, I think, Antonio, that you started to school on January 29?

(Testimony of Antonio V. Bustamente.)

A. No, sir; I started school on February 6th.

Q. February 6th? A. Yes.

Q. And this was a month later that you gave Mr. Streicher a receipt for these tools and books?

A. I did.

Q. When did you sign this, Antonio? Do you mind my calling you Tony?

A. That is all right.

Q. When did you sign this statement, Tony?

A. March 18th.

Q. March 18th? A. Yes, sir.

Q. Now, do you recall when you signed this receipt for Mr. Streicher and having received all of the tools and books?

A. Well, I recall signing the statement.

Q. You mean a receipt?

A. When I signed the receipt.

Q. Yes.

A. No, I don't recall the date that I signed the receipt. [61]

Q. Was it before you signed this, Tony?

A. It was before I signed this.

Q. And the punch and those two files and rawhide mallet and goggles and pliers and chisel and the rule and protractor and clamps were all that were lacking from the original tool kit, is that correct? A. That is correct.

Q. Now, I think you said you—let me get the date clear. Was it February 6th this school started instructions?

(Testimony of Antonio V. Bustamente.)

A. Well, the school started the 31st of January. I started the 6th of February.

Q. Very well, Tony, thank you.

The Court: Any further questions?

Mr. Flynn: No questions.

The Court: That is all. Call your next witness.

Mr. Peterson: Mr. Urbano.

JOAQUIN C. URBANO

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. State your name, please.

A. Joaquin C. Urbano.

Q. And where do you reside?

A. 4526 South 11th Avenue. [62]

Q. Tucson? A. Yes, Tucson.

Q. Have you ever been a student in the Arizona Institute of Aeronautics? A. I have.

Q. Were you a student there during the early part of 1949? A. I was.

Q. Particularly during March?

A. Yes, sir.

Q. Now, did you receive some tools from the Institute when you went there as a student?

A. I did.

Q. And some books? A. Yes, manual 18.

The Court: Talk louder. Don't be afraid anybody is going to hurt you.

(Testimony of Joaquin C. Urbano.)

The Witness: I received a notebook and manual 18 and O-4 manual.

Q. (By Mr. Peterson): Did you receive all the tools that you were entitled to?

A. No, not before March 18th.

Q. Did you receive them any time before March 18th? A. No, sir.

Q. Did you receive them afterwards? [63]

A. Yes, sir.

Q. Was that after Mr. Smith left the school?

A. Yes, sir.

Q. But up until the time he left had you received all of the tools which you were supposed to have at the school? A. No, sir.

Mr. Peterson: That is all.

Cross-Examination

By Mr. Wheeler:

Q. Joaquin, did you ever sign a receipt for Mr. Streicher saying that you had received all your tools in full prior to March 18th?

A. I signed a receipt, but I don't know whether it was for all the tools.

Q. You don't know what that receipt contained, do you, Joaquin? A. No, sir.

Q. And you don't know whether Mr. Smith ever saw that receipt or not, do you? A. No, sir.

Q. Mr. Streicher had possession of the tools and he was the one that gave them to you, was he?

A. Yes, sir.

(Testimony of Joaquin C. Urbano.)

Q. And you signed a receipt for the tools and books for Mr. Streicher, is that correct? [64]

A. Yes, sir.

Mr. Wheeler: No further questions.

Mr. Peterson: That is all.

The Court: Call your next witness.

Mr. Peterson: Oscar M. Gomez.

OSCAR M. GOMEZ

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. What is your name, please?

A. Oscar M. Gomez.

Q. And where do you reside, Mr. Gomez?

A. 340 East Pennsylvania Drive.

Q. Tucson? A. That is right.

Q. Have you ever been a student in the Arizona Institute of Aeronautics? A. Yes, sir.

Q. Were you there during the months of February and March of 1949? A. Yes, sir, I was.

Q. Did you receive some tools from that institution? A. Yes, I did.

Q. Did you receive all the tools that you were supposed [65] to receive? A. No.

Q. Did you receive some books? A. Yes.

Q. Did you receive all the books you were supposed to receive? A. No.

(Testimony of Oscar M. Gomez.)

Mr. Peterson: That is all.

Cross-Examination

By Mr. Wheeler:

Q. Oscar, where were these books published, do you recall? Were they Washington publications—publications by the Government, or do you recall?

A. No, I don't recall where they were published.

Q. You don't recall whether they were manuals out of Washington or not or anything of that sort? I am not trying to lead you too much. I am just trying to refresh your memory. If you don't know, you don't know.

A. No, I don't remember.

Q. Had you ever signed a receipt prior to this statement that you had received all your tools in full and the books? A. Yes, I had.

Q. By whom was that receipt offered to you, Oscar A. By Fred Streicher. [66]

Q. Did you keep a copy of that receipt?

A. No, I did not.

Mr. Wheeler: That is all.

The Court: Call your next witness.

Mr. Peterson: I will call Mr.——

The Court: Counsel, can't you stipulate that if the balance of the students were called their testimony would be more or less the same? In any event, their testimony would be cumulative, would it not?

(Testimony of Oscar M. Gomez.)

Mr. Wheeler: That would be my opinion, but Mr. Peterson is putting on his case.

The Court: Of course, but wouldn't the balance of the testimony be similar to the last witness?

Mr. Wheeler: That would be my reaction. I don't know, of course, what he intends to put on, your Honor. There may be deviations. If he wants a stipulation to that effect I will be glad to so stipulate.

The Court: I am merely suggesting it as a time-saver for everybody. We have heard three or four of them and if you will stipulate that the balance of the witnesses, and this is with reference to Count Two, that the students named herein would testify in substance to the same as the last witness.

Mr. Peterson: And we have also the three students in Count Two. [67]

The Court: All right, you can go to Count Two, but do you gentlemen care to enter into that stipulation?

Mr. Wheeler: Yes, I am quite willing to, your Honor.

The Court: It will save time for all of us.

Mr. Peterson: That is agreeable.

The Court: Very well, call your next witness.

Mr. Peterson: Mr. Hunt.

CHARLES R. HUNT

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. State your name, please.

A. Charles R. Hunt.

Q. Where do you reside, Mr. Hunt?

A. Apartment 177, Consolidated Dwellings.

Q. Were you ever a student in the Arizona Institute of Aeronautics? A. Yes, sir.

Q. Were you a student there during February and March of 1949? A. March, sir.

Q. During the month of March?

A. Part of it.

Q. Did you receive some tools from the [68] Arizona Institute of Aeronautics?

A. Yes, sir; but I don't recall the date right now.

Q. Well, did you receive all the tools that you were supposed to receive? A. Not in March.

Q. When did you receive them? Did you receive them after Mr. Smith left the school?

A. I don't recall the date, sir, myself.

Q. Well, do you know whether or not——

A. I signed receipts.

Q. Do you know whether or not Mr. Smith was in charge of the institution then or had he left?

A. Well, I would have to see the date that I signed the receipt first. I wouldn't recall that.

(Testimony of Charles R. Hunt.)

Q. Well, did you receive all the tools that you were supposed to receive? A. Yes, sir.

The Court: At what time?

The Witness: Not at one time.

The Court: Not at one time?

The Witness: No, not at one time, no, sir.

The Court: Did you receive them in two different lots?

The Witness: Yes, sir.

The Court: What was the occasion of your receiving additional tools after the first issuance to you? [69]

The Witness: Well, they told us or I understood it that they were on order and they couldn't be obtained and they just had part of them available?

The Court: Counsel, the second count says "on or about the 19th day of April."

Mr. Peterson: Yes.

The Court: Had you received all your tools by April 19th?

The Witness: No, sir, I don't believe so.

Mr. Peterson: That is all.

Cross-Examination

By Mr. Wheeler:

Q. Mr. Hunt, just one question. Could you by any chance tell where those books were published—these manuals that were spoken of earlier?

A. Of course, the manuals—anyone should know that they was published in Washington—a lot of them.

(Testimony of Charles R. Hunt.)

Q. Washington, D. C.? A. Yes, sir.

Mr. Wheeler: That is all.

Mr. Peterson: That is all. I will call Mr. George Patterson. [70]

GEORGE E. PATTERSON

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. Will you state your name?

A. George E. Patterson.

The Court: Just a moment. A juror indicates he wants to ask the witness a question.

A Juror: Any one of these witnesses, your Honor. I wonder if we could determine one of these dates when he entered school and when he got part of his tools and then when he finally got all of them—whether he was studying during this period.

The Court: Counsel will cover that with the next witness.

Mr. Peterson: It has been covered.

Q. (By Mr. Peterson): Just state your name, please. A. George E. Patterson.

Q. Where do you reside?

A. McNary, Arizona.

Q. And have you ever been a student at the Arizona School of Aeronautics? A. Yes, sir.

Q. Were you in that school during the months of [71] February and March of 1949?

(Testimony of George E. Patterson.)

A. (No answer.)

The Court: When did you enroll?

The Witness: I enrolled March 14th.

The Court: When did you leave the school?

The Witness: The last of June of 1949.

Q. (By Mr. Peterson): Did you receive some tools from that school during those months?

A. Yes, sir.

Q. Did you receive all that you were entitled to before March 18, 1949? A. No, sir.

Q. Or before April, 1949?

A. I can't recall the dates, sir.

Q. Well, do you recall when Mr. Smith left the school? A. No, sir.

The Court: Do you recall making a statement to a representative of the Federal Bureau of Investigation?

The Witness: No, sir.

Mr. Peterson: He did not make a statement to him.

The Court: Did you receive all your tools at one time?

The Witness: No, sir.

The Court: They were delivered to you in two different lots?

The Witness: Yes, sir. [72]

The Court: What was the occasion of the delivery of the second lot, do you know?

The Witness: (No answer.)

The Court: Was it due to any trouble in the school?

(Testimony of George E. Patterson.)

The Witness: Well, that I don't know.

The Court: You don't know anything about that?

The Witness: No, sir.

The Court: All you know is you got the tools in two different lots?

The Witness: That is right.

The Court: That is all.

Mr. Peterson: That is all.

The Court: Any questions, Mr. Juror?

The Juror: Were they in training between the time—were they in school without the necessary tools?

The Court: I don't quite understand your question, Mr. Morgan. Will you ask it again?

Juror Morgan: Were they going to school without the necessary tools to get their training as mechanics?

The Court: Were you lacking in tools for a part of the time?

The Witness: Sometimes we were, yes, sir.

The Court: And was that because they had not been issued to you?

The Witness: Yes, sir. [73]

Mr. Peterson: That is all.

Cross-Examination

By Mr. Wheeler:

Q. George, did you ever sign a receipt acknowledging that you received all the tools in full?

A. I believe I did, sir.

(Testimony of George E. Patterson.)

Q. You believe you did? A. Yes, sir.

Q. Do you know by whom that receipt was tendered?

The Court: You started out with a pretty good voice but now you have quieted down for some reason or other.

The Witness: By Mr. Streicher.

Q. (By Mr. Wheeler): By Mr. Fred Streicher?

A. That is right, sir.

Q. Was he an officer in the Arizona Institute of Aeronautics, or do you know?

A. I don't know his position.

Q. But he was out there? A. That is right.

Q. By whom were these tools issued?

A. (No answer.)

Q. I mean if you remember.

A. I don't remember.

The Court: Do you know from whom you received the tools, the first lot? [74]

The Witness: The first lot was Mr. Streicher.

The Court: From whom did you receive the second lot?

The Witness: Mr. Streicher, I believe.

Q. (By Mr. Wheeler): Now, was your school work ever held up for lack—your instructions out there, were they held up for lack of tools, George?

Mr. Flynn: Object to the question as immaterial.

The Court: The juror asked the question and I am going to let counsel follow it up.

Q. (By Mr. Wheeler): What was your answer?

(Testimony of George E. Patterson.)

The Witness: I do not recall in my class.

Q. (By Mr. Wheeler): In other words, you went right along with your studies without any inconvenience, is that correct, George?

A. Yes, sir.

Mr. Wheeler: That is all.

Mr Peterson: We object to that question and the answer. I don't think that has anything to do with the issues here.

The Court: The only thing is the juror started it and I helped him along and I couldn't foreclose the defendant from asking that question.

Of course I want to again emphasize there is only one question here and that is whether this defendant filed vouchers that were false or not true, and if they were not true did [75] this defendant have knowledge that they were not true. That is really the only question before the jury. In other words the filing of a false claim knowing it to be false notwithstanding the fact that they may have made good afterwards. That would be no defense.

Mr. Peterson: That is all.

Mr. Wheeler: We have no further questions.

The Court: Call your next witness.

Mr. Wheeler: The defense is willing to stipulate as to the remaining witnesses the same as we did earlier.

Mr. Peterson: That is all right.

The Court: You will stipulate that the remaining witnesses will testify the same as the last witness?

Mr. Peterson: Yes.

Mr. Wheeler: Yes.

The Court: Very well. You may proceed.

Mr. Peterson: Mr. Streicher.

FRED W. STREICHER

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. State your full name, please.

A. Fred W Streicher.

Q. Where do you live, Mr. Streicher? [76]

A. 2639 North Woll (phonetic) Boulevard.

Q. Were you connected with the Arizona Institute of Aeronautics? A. Yes, I was.

Q. Were you connected with that institution during the early part of 1949? A. Yes, sir.

Q. Do you know the defendant in this case?

A. Yes, sir.

Q. G. Clifford Smith? A. Yes, sir.

Q. Was he there at that time? A. Yes, sir.

Q. What were your duties at the school during that period of time?

A. Well, mostly to get the school organized and get things rolling as far as setting up the school.

Q. Did you have anything to do with the giving of tools and books to the students?

A. The tools when they were received they were checked and found to be incomplete——

(Testimony of Fred W. Streicher.)

The Court: You will have to speak up so we can hear you.

The Witness: The tools we received from Sears Roebuck were found to be incomplete and they were checked by Mr. McConnell and myself and Mr. Smith and there was some question [77] about issuing the tools and we were told to go ahead, that the rest of them would be in shortly and would be completed.

The Court: Now, Mr. Reporter, will you read the answer?

(Answer read.)

Q. (By Mr. Peterson): How long did you remain at the school?

A. Oh, until sometime in the latter part of May, I believe. I don't recall.

Q. Had Mr. Smith already left there when you left? A. Yes, sir.

Q. Now, were there any tools delivered to any of the students there before Mr. Smith left or were they delivered after he left—additional tools?

A. There were some additional tools that were delivered after Mr. Smith left.

Q. Did you know anything about—I will hand you Government's Exhibit 4 and ask you if you knew anything about that voucher which was issued as of March 18, 1949?

A. Well, I didn't know anything about it at the time but I did know later that it had been issued.

The Court: You heard about it afterwards?

(Testimony of Fred W. Streicher.)

The Witness: Yes, sir; that it had been issued.

Q. (By Mr. Peterson): Did you have any conversation at any time with Mr. Smith relative to the issuance of that voucher or other vouchers? [78]

A. No, not that I recall, only that there was a question about this voucher since the tools weren't complete and we were given to understand that it was okay to send this in.

Q. Who told you that? A. Mr. Smith.

The Court: Will you read the answer, Mr. Reporter?

(Answer read.)

The Witness: It really wasn't a question of this particular voucher. It was a question of vouchering for those tools and we were given to believe that it was okay to voucher for the tools because the balance of the tools and so forth would be forthcoming shortly.

Q. (By Mr. Peterson): Was that Mr. Smith who gave you that understanding? A. Yes, sir.

Q. Well, up until the time Mr. Smith left there never had been any additional tools or books given to the students, had there?

A. Will you state that again, please?

Q. Up until the time Mr. Smith had left the institution there had been no additional books or tools issued to the students?

A. No, they hadn't come in.

Q. That was done after Mr. Smith left?

A. Yes, sir. [79]

(Testimony of Fred W. Streicher.)

The Court: Just a moment. Who handled the financial affairs of the institution?

The Witness: Mr. Smith as far as I know. He was the treasurer.

The Court: He was the treasurer?

The Witness: Yes, sir.

The Court: You knew that the money came through for these tools, did you not?

The Witness: I knew that they had come through, yes.

The Court: And you knew the tools had not been delivered?

The Witness: That is right.

The Court: Did you ever discuss that with Mr. Smith?

The Witness: No, sir; only about sending vouchers for them is all.

The Court: You may cross-examine.

Cross-Examination

By Mr. Wheeler:

Q. Mr. Streicher, to clarify a point if you will, did these students enroll in classes or was there staggered enrollment or what was the situation out there? A. Now that I don't know, sir.

Q. Well, I mean by that—you were out there, were you not?

A. Yes, sir, I was. I didn't have much to do in the office at that point. I was still working on different [80] items, getting things in working order for the school.

(Testimony of Fred W. Streicher.)

Q. At what point are you speaking of now?

A. Well, at the time when this all happened—this dilemma.

Q. Now, I believe you stated that Mr. Smith had control of the books and everything?

A. He had control of the ordering—all the ordering.

Mr. Wheeler: Do you have the earlier answer, Mr. Reporter?

Q. (By Mr. Wheeler): Now, Mr. Streicher, on the 9th day of May, 1949, in the case of G. Clifford Smith, plaintiff, versus Arizona Institute of Aeronautics Incorporated, a corporation, and Paul R. Ehlers individually and as president of the Arizona Institute of Aeronautics Incorporated, a corporation——

Mr. Peterson: We object to all this.

The Court: Let him finish the question.

Mr. Wheeler: Case No. 31909. Do you recall making that affidavit, sir? A. Yes.

Mr. Peterson: May I see that?

Mr. Wheeler: Yes, indeed, Mr. Peterson.

Q. (By Mr. Wheeler): Mr. Streicher, did you ever have occasion to voucher for any materials for the Arizona Institute of Aeronautics? [81]

A. No.

Q. You never signed a voucher yourself?

A. I did sign a voucher, yes.

Q. Just one voucher, sir?

A. Oh, I don't know—one or two.

Q. Pardon me? A. One or two maybe.

(Testimony of Fred W. Streicher.)

Q. Maybe a half dozen?

A. I don't really recall.

Q. Now, you at one time were a stockholder in this organization, weren't you? A. Yes, sir.

Q. You are no longer a stockholder, are you?

A. Yes, I am.

Q. Are you? A. Yes, sir.

Q. Did you at any time have occasion to turn your stock back to the organization?

A. Yes, sir, I did—part of it.

Q. And was that for an agreement and in consideration of certain withholding actions on the part of——

Mr. Peterson: Your Honor, I object to this line of testimony. It is improper cross-examination. It is something about the internal affairs of this corporation out there which has nothing to do with the charge against this [82] individual.

The Court: Will you read the question?

(Question read.)

The Court: Objection sustained. Counsel, let me say this. If you desire to show that this witness had any animosity toward the defendant you may bring that out, but the affairs of the corporation are not the problem of this court or this jury.

Mr. Wheeler: I think, may it please the court, it might apply to the credibility of this particular witness, showing that as treasurer of the corporation he had sole control of the financial affairs.

The Court: This was on May 9th?

(Testimony of Fred W. Streicher.)

Mr. Wheeler: That was when the reorganization took place. It refers back to this earlier period of time in which he testified. I don't bring it out for the purpose of impeachment if it please the court, but I think from the standpoint of the credibility of the witness that the jury is certainly entitled to know that this man was in charge of the financial transactions, at least partially, during this period.

The Court: This is an affidavit in which he states he was treasurer on May 9th and that is after the transactions involved in this case. If you want to bring in the books of the company——

Mr. Wheeler: Those have been subpoenaed, your Honor. [83]

The Court: I want to say for the benefit of counsel and the jury that we are only trying one case and one individual, and that individual is Mr. Smith. The question before the jury now is whether or not he is guilty of the charges alleged in this indictment. Matters that are brought in as to the affairs of the corporation or any difficulties the corporation may have experienced are not material to this case and we will proceed with the trial of this defendant and not of the corporation.

Q. (By Mr. Wheeler): Mr. Streicher, would it refresh your memory on these orders if you had the corporation's books to look at?

A. No, it wouldn't, sir, because I didn't have much to do with the books at all. I didn't have anything to do with them.

(Testimony of Fred W. Streicher.)

Q. Were you in any capacity out there with the company?

The Court: You are letting your voice fall, too. You are getting the same habit.

Mr. Wheeler: Well, I thought I might get him to raise his voice, your Honor. That was my purpose. I thought there would be the opposite reaction. I can speak louder.

The Court: I know you can. That is the reason I made the comment.

Mr. Wheeler: But I was in hopes of getting a little more volume from the witness. [84]

The Court: It is bad enough for the witness to make us suffer let alone attorneys.

A Juror: May I ask a question?

The Court: Yes.

A Juror: I can't get it straight in my mind why these receipts were signed in full before the things were delivered. That seems to kind of bother me.

The Court: Can you explain that, Mr. Witness?

The Witness: No. Only that the balance of the tools were to be forthcoming very shortly and that it was stated on the receipts that they would receive those as soon as they came in.

The Court: Isn't it a fact that you had the receipts signed in full to support your claim?

Mr. Wheeler: Well, now, your Honor——

The Court: Do you know whether they signed a receipt in full?

The Witness: I was told to get the receipts signed that way.

(Testimony of Fred W. Streicher.)

The Court: By whom?

The Witness: By Mr. Smith. In other words, I was working under Mr. Smith's direction.

A Juror: Did this receipt show that they hadn't received all the tools and would receive them later?

The Witness: Yes. I think all the tools that they hadn't [85] received were checked and there was a notice saying that they would get them just as soon as they came in.

Q. (By Mr. Wheeler): Am I right, Mr. Streicher, then in assuming from your statement to the jury that the students knew these tools were on order and would receive them?

A. That is right.

Q. I don't believe you answered my question as to what capacity you held with this company?

A. That is something I don't know either.

Q. Well, did you have any honorary title, sir?

A. Well, originally I was supposed to be employed as office manager but that never materialized.

Q. Didn't you have an office to manage?

A. No.

Q. Were you president or vice-president?

A. I was vice-president of the corporation, yes.

Q. Were you in charge of instructions and organization? A. No, sir.

Q. You didn't have that title? A. No, sir.

The Court: What were you doing for a living at about that time?

The Witness: As I stated before, your Honor, I was working with Mr. McConnell in getting the

(Testimony of Fred W. Streicher.)

school organized, so we could get it started and start our first classes under [86] the direction of Mr. Smith.

The Court: Who was the head of the school?

The Witness: Mr. Smith.

The Court: Were you one of the organizers?

The Witness: Well, you might call it that.

The Court: Who was the party that started this school?

The Witness: Mr. Smith started it. He had the foundation for it which was very good as far as I could see.

The Court: Then you became associated with Mr. Smith, you and the others?

The Witness: Yes, sir.

The Court: And formed this corporation?

The Witness: That is correct.

Q. (By Mr. Wheeler): Did you become associated with Mr. Smith or did you become associated with the Arizona Institute of Aeronautics?

A. Became associated with the Arizona Institute of Aeronautics.

Q. When you first became associated with this school was it incorporated?

The Witness: It was being incorporated.

The Court: It was being incorporated?

The Witness: In the process, yes, sir.

The Court: By whom?

The Witness: By the rest of the stockholders.

Q. (By Mr. Wheeler): Would you say that this statement would more or less clarify the position of

(Testimony of Fred W. Streicher.)

the institute out there? You had a shoe string operation and were trying to give instruction to veterans, is that not true?

A. It possibly could be stated that way, yes, sir.

Q. That is about as briefly stated as it could be?

A. Yes, sir.

Q. Do you recall whether you were an officer in this corporation prior to March 18th?

A. Yes.

Q. Of 1949? A. Yes, sir.

Q. You were an officer? A. Yes, sir.

Q. Now Mr. Streicher, was there a normal check and balance in the flow there so that a person—for example did the president of the company know what was being ordered for tools and equipment and supplies? A. He could have.

Q. Well, now, I might be president too but I am asking you a question—did he know?

A. That I don't know. I don't know.

Q. Not that he could know.

Mr. Peterson: We object unless we know the man's name. I don't know who the president of the company is. [88]

The Court: Counsel, you are asking what somebody else would know. How would he know what somebody else knew?

Mr. Wheeler: Well, he is testifying as an officer of the corporation, your Honor, and I am trying to see how widespread his knowledge was as to these purported purchases and so forth and if it went through the regular channels or if it was simply

(Testimony of Fred W. Streicher.)

chopped off when Mr. Streicher received the receipts for these various tools. I think it is quite material in determining any intent.

The Court: I haven't any objection to this witness testifying to something he knows but I am wondering how he would know what somebody else knew. Can you answer the question?

The Witness: No, sir, I can't.

Q. (By Mr. Wheeler): You didn't attend any of the meetings of the corporation officers?

A. Very few—maybe one or two.

Q. Do you know, Mr. Streicher, whether or not in the middle of March, 1949, there were some books in the post office to be delivered to the Arizona Institute of Aeronautics?

A. No, I don't recall.

Q. Now, there were some of these students, I suppose, that hadn't received all of their tools and books, Mr. Streicher? A. That is right. [89]

Q. And those were the vouchers you put through earlier yourself? A. Not that I recall, no.

Q. You recall signing or vouchering for some?

A. Yes, sir.

Q. You wouldn't say at this time how many?

A. No, I wouldn't know.

Q. Well, now, I am not being over repetitious I hope, but with the court's permission what I am getting at is this, did you get a block of students in there on March 10 or any day in March for instruction?

(Testimony of Fred W. Streicher.)

A. I wouldn't recall that.

Q. In other words you don't know—were you out there sufficiently to know whether these students lacked tools or books during their instruction course?

A. Very few. There weren't any tools to speak of that we were lacking.

Q. And the school kept operating with the intent of instructing these students and keeping them going, is that correct? A. That is right.

Q. Fred, I hand you a copy of the contract originally entered into—will you mark this as Defendant's——

Mr. Peterson: There is a copy already in evidence.

Mr. Wheeler: But we have this one [90] underlined.

Mr. Peterson: We object to it if it is underlined.

Mr. Wheeler: Let me have the original copy and I will call attention to the matters I have in mind. May I have a few moments, your Honor?

The Court: Counsel, we have been delayed this morning several times. I am not saying it is your fault, but I am trying to get this case to the jury this afternoon.

Mr. Wheeler: Yes, I am well aware of that, your Honor. I believe that is all of this witness at this time, your Honor.

The Court: Any further questions from this witness by counsel for the Government?

(Testimony of Fred W. Streicher.)

Mr. Peterson: Just one moment—just one question.

Redirect Examination

By Mr. Peterson:

Q. You stated that you thought that the boys expected to have the rest of the tools at a later date, is that correct? A. Yes, sir.

Q. But they had not received them at the time Mr. Smith left the school?

A. That is right.

Q. In the meantime had Mr. Smith filed vouchers which covered those tools, to your knowledge?

A. Not to my knowledge. I wouldn't know.

Mr. Wheeler: I am sorry, but I can't hear [91] you.

The Witness: I say I don't know.

Q. (By Mr. Peterson): He left the school at about what date?

A. I think it was around May 23rd if I am not mistaken.

Q. Are you sure whether it was April or May?

A. April or May. I just don't recall the date.

Mr. Peterson: That is all.

The Court: That is all. Call your next witness.

Mr. Peterson: The Government rests.

The Court: You may proceed, Mr. Wheeler.

Mr. Wheeler: May it please the court, we would like to have an opportunity of arguing a motion here. We have two motions in fact and we at this time move to dismiss this action.

The Court: The motion will be denied.

Mr. Wheeler: As to the other matter the court might desire to have it argued in the absence of the jury.

The Court: Very well. We will take a recess until 1:45.

The jury will remember the court's admonition not to discuss the case among yourselves or permit anybody to discuss it with you and you are not to express or form any opinion until the case is finally submitted to you.

You will be excused until 1:45 this afternoon.

(Whereupon the jury retired from the courtroom.) [92]

The Court: You may proceed, Mr. Wheeler.

Mr. Wheeler: The first motion, your Honor, is predicated on the thought and theory that there is a material defect in this indictment in that the sums alleged vary so materially from those set forth in the indictment that it is sufficient to again renew our motion to dismiss insofar as the Government's case is concerned. The evidenciary matters are in conflict and I think the conflict is of a serious nature.

The Court: What is the conflict?

Mr. Wheeler: The conflict is a matter of $54.60 on the first count and $23.40 on the second count.

The Court: You mean they didn't charge the defendant with embezzling enough money?

Mr. Wheeler: That might be one reaction to it. They should have set forth definitely in their charge the amounts that they allege.

The Court: I don't think there is sufficient variation to argue about.

Mr. Peterson: The voucher speaks for itself. The original voucher was for $100.00 for a student and they allowed a 10 per cent carrying charge and 2 per cent discount.

The Court: I am going to let the jury settle this case. I feel a prima facie case has been established. I have been watching the evidence rather carefully and I think it is sufficient to make a prima facie case. [93]

Mr. Kipnis: I would like to make one observation to the court.

As the United States Attorney stated the voucher speaks for itself but I would like the court to direct its attention to the certification by Mr. Smith. I believe both of them are alike. I would like the court to follow the reading of it.

The Court: I will take your word for it. You read it. I am not questioning you, counsel.

Mr. Kipnis: The certification is that the bill is correct; that payment has not been received and all conditions have been complied with and state and local sales taxes are not included.

It is a certification merely as to the correctness of a bill and that is a specific and separate certification which bears the signature of the payee, Arizona Institute of Aeronautics, by G. Clifford Smith and I would like also for the court to take judicial notice of the statement as follows, which is signed by an authorized certifying officer, H. P. Thomas, whom the Government has so very, I suppose, negligently

neglected to bring in here. He certifies that the articles were received in good condition after duly inspecting and after acceptance and delivery prior to payment as required by law. I submit to your Honor——

The Court: Simply because the Government has not produced [94] everyone who might have had something to do with these transactions does not excuse this defendant.

Mr. Kipnis: No, I am not making that point, your Honor. I am making the point that the certification signed by the school—by Mr. Smith——

The Court: Let me see it.

Mr. Kipnis: Is that the bill is correct and the Government's own testimony is that approximately $100 worth of tools were delivered, so the bill was correct.

Mr. Peterson: We don't say "approximately."

The Court: Equipment furnished beneficiary of the veterans administration and so forth, as appear in the attached schedule.

This is to certify that the articles represented were delivered to the trainee and that the institution has on hand and available for inspection by the Veterans Administration evidence of such delivery and expenditures. That no amount received from the Government is used or will be used as a rebate, prize or other payment in goods or money to the veteran trainee.

He certifies that is true.

Mr. Kipnis: No, he does not. He certifies the bill is correct.

The Court: He says:

"I certify the above-bill is correct and [95] just; that payment thereof has not been received and that statutory requirements,"

and so forth

"have been complied with."

And above there is a statement in typewriting stating that the books and supplies and equipment had been furnished.

Mr. Kipnis: The point I am trying to make is that there is a statement as distinct and separate from a certification as can be and was signed by the school. That states that the requirements of the United States Code is that the certification be correct and that the statement signed by the school, by the defendant is that the bill is correct and just.

The Court: But isn't Mr. Thomas the Government officer who certifies to the correctness of the bill?

Mr. Peterson: He is certifying to that, yes.

The Court: Is he authorized as the certifying officer?

Mr. Peterson: Yes.

The Court: Isn't he an administrative officer in the Veterans Administration who audits the bills?

Mr. Peterson: Yes. He probably thought it was all right at the time he received it but it showed up later as not being correct.

He didn't have any means of finding out what had happened at the school—that there had been a false claim filed until the matter was investigated. At

the time of the receipt of [96] that he might have said "So far as we know this bill is correct," but we are now showing it was not correct.

Mr. Kipnis: The only point I am trying to make is that there is a variance between the statement in the voucher and the statement of certification. A separation of the documents shows there are two separate and distinct items. The top one is a reference to the preparation of the voucher and so forth and the number available and so on and then right on the bottom is a separate certification and I submit that that has not been proved to be wrong.

Mr. Peterson: The charge in this case is that somebody fooled the Government, that is the charge, by issuing a false claim. Now, you can't fool the Government except through an agent.

The Court: Mr. Smith certified to that and as far as I am concerned he will have to explain it to the jury. The motion is denied.

Tucson, Arizona, Tuesday, April 11, 1950, 1:45 P.M.

(Whereupon, at 12:00 o'clock noon a recess was had until 1:45 o'clock p.m. of the same day.) [97]

Tucson, Arizona, Tuesday, April 11, 1950, 1:45 p.m.

The Court: Will you stipulate the jurors are present and in the jury box and the defendant in court with his counsel?

Mr. Wheeler: So stipulated, your Honor.

Mr. Flynn: Yes, your Honor.

The Court: You may proceed.

Mr. Kipnis: I would like to call Mr. Robbeloth.

CLETUS F. ROBBELOTH

having been previously sworn, was recalled and testified on behalf of the defendant as follows:

Direct Examination

By Mr. Kipnis:

Q. Were you present, Mr. Robbeloth, at the time the original negotiations were entered into prior to the formation of this school?

A. I was present during all the negotiations between the Veterans Administration and the Arizona Institute of Aeronautics.

Q. Did you know when the original contract, which I believe is in evidence as a Government exhibit, when that contract was delivered to your office?

A. Signed and confirmed by the San Francisco office—may I refer to my records? [98]

The Court: Certainly.

The Witness: On March 9, 1949, my office received a teletype from the reviewing office of the Veterans Administration in San Francisco authorizing us to distribute the contract in the form it presently is.

Q. (By Mr. Kipnis): When did you distribute the contract in this present form?

A. Within the next day—that day or the following day.

The Court: What do you mean by "distributing the contract"?

The Witness: The contract is made up in six copies, your Honor, all of which are retained by the

(Testimony of Cletus F. Robbeloth.)

Veterans Administration subject to review and approval by the reviewing office.

Two copies are forwarded to that office and when they indicate that it has been approved they notify us that the contract has been approved and rather than sending them back we then distribute the other four copies, one of which goes to the school, one is kept in my office and two go to the finance officer of the Veterans Administration, from where one is forwarded to the general accounting office in Washington.

Q. (By Mr. Kipnis): How did the school operate from the time of—February 1st or January 31st until the final [99] order, the contract received approval?

A. The school operated under a memorandum agreement. It is a general contract which says the school will offer such services and the Government will pay for such services at rates and in particulars to be determined and set forth in a formal contract at a subsequent date.

Q. So that from the time of January 31st until actually you received confirmation this contract then was not binding upon the school?

A. Yes, that contract was binding.

Q. It was binding but wasn't that subject to change by either the office at San Francisco or the Washington office?

A. From the day that a memorandum agreement was negotiated, the entire negotiations were subject

(Testimony of Cletus F. Robbeloth.)

to mutual agreement between the school and the Veterans Administration within the limits of the Veterans Administration regulations.

Q. What I am getting at is this. Didn't the San Francisco office or the Washington, D. C., office have the right to make any changes that they thought were requisite in this particular contract?

A. They had the right—they did not have the right to make changes in the contract. They could either accept it as is or return it for revisions upon which the school would have authority to agree or disagree. [100]

The Court: Counsel, what is the materiality of that?

Mr. Kipnis: That there was a time when this school operated under a memorandum agreement, which is not yet introduced into evidence, and which I would like the jury and court to know about.

The Court: I think the meorandum agreement is in evidence, is it not?

The Witness: Yes, sir; it is a part of the contract identified as Exhibit A to the contract.

The Court: What was the date of the contract?

The Witness: The date of the contract was February 28, 1949.

The Court: I don't see the materiality of this line of questioning.

Mr. Kipnis: If the court please, according to the testimony just heard neither the San Francisco office nor the Washington, D. C., office had the right to reject this entire contract.

(Testimony of Cletus F. Robbeloth.)

The Court: Counsel, the question here is whether there was a false claim.

Mr. Kipnis: I realize that.

The Court: And that is the issue, whether it was knowingly false.

Mr. Kipnis: The issue is knowingly false and that is what I am trying to get at. [101]

The Court: If a man submits a claim for goods that he bought and claims $75.00 for them when they cost $58.58 and he knows it, whether there was a contract or not, it would be a false claim.

Mr. Kipnis: If the court will bear with me instead of giving me examples which I believe are very prejudicial——

The Court: I am telling you that line of questioning is out of order. You may take your exception and proceed.

Q. (By Mr. Kipnis): Mr. Robbeloth, referring again to the contract, do you know whether it was required that the school deliver all the tools and books at one time?

A. I know that it is not required that they deliver them all at one time.

Q. And would you refer to the contract with particularity to Article I under instructions, subsection (d)? A. Yes, sir.

Q. And was that—will you tell the jury just the effect of that particular section.

Mr. Kipnis: We have a complicated contract here, your Honor.

The Witness: That section provides that the con-

(Testimony of Cletus F. Robbeloth.)

tractor will furnish outright to the Veterans as needed such books, supplies and equipment as are necessary for the satisfactory pursuit and completion of the courses as referred to in paragraph C. It is understood and agreed that the books, [102] supplies and equipment to be so furnished will consist of those items required but in no instance greater in variety, quality or amount than are required by the contractor to be provided personally by other and all students pursuing the same or similar courses.

Q. (By Mr. Kipnis): In the interest of time, your Honor, I would like to have reference to the article where the delivery of tools and books as required——

The Court: It was just read, was it not?

Mr. Kipnis: And also in the rules and procedures which we referred to earlier this morning.

The Witness: I could state that substantially the same thing exists in the regulations and the rules and procedures.

Q. (By Mr. Kipnis): That delivery as needed.

A. Delivery as needed.

Q. Mr. Robbeloth, did you have negotiations with any other officers or members of this corporation?

A. Yes, sir. My first contact with the Arizona Institute of Aeronautics, to the best of my memory, was with Mr. Clifford Smith and Mr. Paul Ehlers together in my office.

Q. Were there any other officers that you had contact with?

(Testimony of Cletus F. Robbeloth.)

A. During the course of later events I believe I had [103] occasion to discuss the Veterans Administration business with every officer of that company save three who are identified as military personnel.

Q. I will ask more specifically, up to and including March 18 did you have occasion to confer or negotiate with other officers or members of this corporation?

A. I don't know the exact day, Mr. Kipnis, but approximately March the 18th Mr. Ehlers and Mr. Skruggs, representing the corporation, Mr. Streicher and Mr. McDonald or McConnell came to the Veterans Administration in Phoenix to represent the school in a matter.

Q. I see.

A. I was in on the conference.

Q. Do you know how the estimated costs were established to be the basis of $100 as far as tools and books were concerned? A. Yes, sir.

Q. How were they arrived at?

A. The school submitted a list of tools which were required of all persons enrolling there. They submitted two lists. In fact, one was for one course and one for another.

That list was examined by the Veterans Administration, myself and others, and found to be in accordance with the tools normally required for those types of courses and we compared the tools to retail prices which were prevalent in Phoenix [104] at that time and determined that the would not exceed

(Testimony of Cletus F. Robbeloth.)

$75.00 in one amount and of $100.00 in the other list.

Q. Do you know of your own knowledge who it was that prepared these lists for the school?

A. I was told by several different people who prepared the list.

Q. Well, do you know who prepared the list?

A. I didn't see them prepared.

Mr. Kipnis: Nothing further.

The Court: I have a few questions I would like to ask this witness.

Are you familiar with the methods followed in the filing of public vouchers?

The Witness: Yes, sir.

The Court: With the Veterans Administration?

The Witness: Yes, sir.

The Court: Do you know a person by the name of H. P. Thomas?

The Witness: Harry R. Thomas.

The Court: I see a signature here purporting to be the signature of the authorizing agent. Do you know whose signature that is?

The Witness: H. R. Thomas, yes, sir.

The Court: What is his position?

The Witness: He is chief of the voucher auditing section [105] of the financial division of the Veterans Regional office—Veterans Administration Regional Office.

The Court: It is a Governmental office connected with the auditing of these claims?

The Witness: Yes, sir.

The Court: Any further questions, gentlemen?

Mr. Peterson: No, your Honor.

The Court: That is all.

Mr. Kipnis: I would like to call Mr. Burke to the stand.

PATRICK BURKE

called as a witness on behalf of the defendant, being first sworn, was examined and testified as follows:

Direct Examination

By Mr. Kipnis:

Q. Will you state your name, Mr. Burke?

A. Patrick Burke.

Q. Will you state your position, Mr. Burke?

A. Contract negotiator for the Veterans Administration, Ellis Building, Phoenix.

Q. And did you hold that office sometime in 1949?

A. 1949 at the date of these particular issues I was the contract negotiator for the Veterans Administration located in Tucson.

Q. At the time, on or about January, 1949, were you familiar with these negotiations and these contracts? [106]

A. Yes, sir; about January, 1949, Mr. Smith and Mr. Ehlers contacted me in regard to preliminary negotiations at which time I informed them that we could only contract with an approved school and since they hadn't received approval they would have to meet the first qualification and that was all that happened in the month of January to my knowledge.

(Testimony of Patrick Burke.)

Q. Did the school to your knowledge—was the school in existence—I will withdraw that.

Did the school finally receive approval?

A. It received approval from the Civil Aeronautics Administration and the State Governor's council.

Q. After this approval was received were you part of these preliminary negotiations?

A. Then Mr. Smith called me out to his office one day and stated he had cost data prepared in order to substantiate tuition rates and cost for books and supplies and equipment.

I explained to him at that time that it was not my function—it was the function of Mr. Robbeloth and that he would have to forward that matter to Phoenix.

Q. Did you have conferences with any other officers or members of this school prior to March 8 other than Mr. Smith? A. Yes, sir.

Q. Would you name those officers or [107] persons?

A. Well, there was Mr. Paul Ehlers, whose title was president, I believe, Mr. Frederick Streicher, whose title was vice-president.

Q. There was a Mr. Smith, Clifford Smith. I believe his title was director of the school and treasurer of the corporation at that time?

A. There was an attesting by Mr. Lawrence (phonetic) who was the official secretary of the corporation.

I was introduced to a Lt. Neville and Capt. Wiley

(Testimony of Patrick Burke.)

who were stockholders. That is all that I know, Mr. Kipnis.

Q. Now, do you know who prepared these estimated costs or these process schedules?

A. No, sir, I don't.

Q. Was there any conversation with any other officer or member of this corporation other than Mr. Smith in discussing the correctness of these costs?

A. The costs, Mr. Kipnis, were negotiated strictly with Mr. Robbeloth.

Mr. Kipnis: Nothing further, your Honor.

Mr. Peterson: No questions.

The Court: I have a question to ask.

There was a statement this morning—were you present in court this morning?

The Witness: Yes, sir.

The Court: There was a statement that you told them it [108] was all right to go ahead and bill the Government for these articles before they were delivered.

The Witness: I heard that statement made, your Honor.

The Court: Is that true?

The Witness: No, sir. Mr. Smith called my office early in February and stated he had services rendered on July 31 and as such could he bill the Veterans Administration for those services.

I informed Mr. Smith that I did not have a copy of the contract. The usual procedure was when one was negotiated a copy would be sent to me at my office in Tucson and that he only had a memoran-

(Testimony of Patrick Burke.)

dum agreement; that he could bill for the services of January 31st if he so chose but there would be no payment until the contract was issued.

Subsequently, in the middle part of February, he telephoned again and stated that the corporation needed money and I told him that was strictly his responsibility. He wanted to know if he could bill for the services rendered. I told him I did not know the individual terms of the contract and wouldn't until I received a copy of it.

I explained to him that my duties and assignment at Tucson was to audit all educational institutions in the southeastern area and that they run a schedule and I would audit his concern July 31st and if the equipment was not delivered and the records so showed it then I would so report [109] it.

That was my conversation with Mr. Smith.

The Court: Then you did not tell Mr. Smith at any time, in substance or in effect, that he could bill the Government for supplies or tools and equipment before they were delivered? You can answer that yes or no.

The Witness: That sir—Mr. Smith called me about the issuance—not the billing——

The Court: I have asked you a question.

The Witness: I never told anyone, sir, they could bill the Government for supplies not issued.

The Court: And that includes Mr. Smith?

The Witness: Including Mr. Smith.

The Court: That is all I have.

(Testimony of Patrick Burke.)

Mr. Kipnis: Did you have occasion to discuss with Mr. Smith, however, the rules and procedures with particular reference to paragraph 80-B? If you wish to refer to your record you may.

The Witness: Paragraph 80-B is on cost data—determination of fair and reasonable cost.

Q. (By Mr. Kipnis): Your discussion with him was that the costs were to be fair and reasonable costs in conformity with the regulation?

A. That wasn't my concern, Mr. Kipnis. That was with Mr. Robbeloth. [110]

Q. Did you have a conference with him concerning manual 7-5? Paragraph 101-C? That is in preparation of the contract. Did you discuss that matter with him?

A. In the preparation of the contract?

Q. In preparing the estimated costs.

A. No, sir, Mr. Kipnis. I had nothing to do with the cost data whatsoever. I was not a contract negotiator at that time.

Q. I am sorry. I perhaps am not making myself clear. But in this discussion—in these discussions with Mr. Smith did the question of estimated costs come up?

A. Yes, sir. Mr. Smith brought the subject up to me one day.

Q. Of estimated costs? A. Yes, sir.

Q. And in that discussion of estimated costs did the regulations come into the conversation?

A. Yes, sir.

(Testimony of Patrick Burke.)

Q. As distinguished from the contract. You are not the contracting officer? A. Correct.

Q. But you did have conversation with Mr. Smith concerning the rules and procedure?

A. Correct, sir.

Q. Now, in connection with those regulations and rules [111] of procedure did you have, do you recall, a discussion concerning—telling Mr. Smith that the—or what in effect regulation 80-B—paragraph 80-B—that is the fair and reasonable compensation? A. Yes.

Q. In effect? A. Yes.

Q. And in effect also the preparation of the cost of books and tools? A. Yes, sir.

The Court: You will have to answer that audibly.

The Witness: Yes, sir.

Mr. Kipnis: Northing further, your Honor.

The Court: That is all. Call your next witness.

Mr. Kipnis: I would like to call Mr. Fred Streicher.

The Clerk: You have been sworn, Mr. Streicher?

The Witness: Yes, sir.

FRED W. STREICHER

called as a witness by the defendant, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kipnis:

Q. Mr. Streicher, were you familiar with the

(Testimony of Fred W. Streicher.)

rules and regulations concerning the estimated costs?

A. No. [112]

Q. What was your authority with the corporation —with the school insofar as having authority to sign vouchers or receipts?

A. That is about all—only anything that Mr. Smith directed. In other words, I was working under him.

Q. You are not answering my question. You had authority, did you or did you not have authority to sign receipts and vouchers for and on behalf of the corporation? A. Yes, sir.

Q. Did you or did you not have authority to sign checks for and on behalf of the corporation?

A. No, I did not.

Q. Were you in charge of the distribution of the tools to the various students? A. Yes.

Q. Were you in charge also of seeing that those tools were in correct amounts?

A. Well, not entirely, no.

Q. Well, you had the duty of distributing the tools, didn't you? A. Yes.

Q. Was it then your duty to account to some other member of the corporation as to whether those tools were distributed?

A. No, just to get the receipt from the students and [113] that went in the files of the corporation—the student files I should say.

Q. Who did you give the receipts to?

A. Well, they were given to the girl in the office and put in the student files.

(Testimony of Fred W. Streicher.)

Q. Now then was it your procedure to check these tools as they came in and give them to the students? A. Yes, sir.

Q. And then get a receipt for them?

A. Yes.

Q. And then you gave the receipt to the girl to file? A. That is right.

Q. Did you check the items off as they came in?

A. They were all checked. In fact those tools were checked by Mr. McConnell and Mr. Smith and myself.

Q. I am asking about your checking them?

A. Yes.

The Court: Do you mean by that that you individually checked them or all three of you checked them together?

The Witness: All three of us checked them together.

Q. (By Mr. Kipnis): At what time did all three of you check them together? When they were delivered from the supplier?

A. When they were delivered, yes.

Q. And how about when they were given to the students? [114]

A. Well, they were issued to the students right after they were checked. They came in in bulk and we put them in their boxes and they were issued to the students as they came in.

Q. Now, were all three, McConnell, yourself and Mr. Smith, present at each time you delivered the tools to the students? A. No.

(Testimony of Fred W. Streicher.)

Q. Isn't it a fact that you were the one that was delivering them to the students? A. Yes.

Q. You and you alone? A. Yes.

Q. And that the others weren't anywhere near it?

A. Well, at times they were. Yes, they had access to the office. They were watching the procedure.

Q. You were the one that gave them the receipt and told them to sign? A. That is right.

Q. Did you see those vouchers, the receipts that you obtained from the students after delivery school?

A. Did I see them?

Q. After you delivered them to the girl in the office? A. No.

Mr. Kipnis: No further questions. [115]

The Court: Any questions?

Mr. Peterson: No, your honor.

The Court: That is all.

Mr. Kipnis: I would like to call Emily Hammes.

EMILY HAMMES

called as a witness by the defendant, being first sworn, was examined and testified as follows:

Direct Examination

By Mr. Kipnis:

Q. Will you state your name?

A. Emily Hammes.

Q. Emily, what was your connection with this school? What was your first connection with this school in 1949?

A. Well, I started working there the 21st of

(Testimony of Emily Hammes.)

February I believe, and the day I went to the school —I received a job through an employment agency. I was told that Mr. Streicher was the office manager. I was to work for him and for a Mrs. Welcom (phonetic) who was Mr. Smith's secretary.

Q. Now, what was your position—what were your exact duties?

A. Well, there was a lot of different duties, such as talking to the students when they came in and filing, writing advertising letters and checking bills.

I did some work on the books such as posting and writing checks. [116]

Q. During the course of your employment did Mr. Streicher give you certain receipts that the students had given him for tools and books?

A. Yes. I got some of those receipts and filed them in their personal files—the students' personal files. Each one had a large file.

Q. When did you leave the employ of the Arizona Institute of Aeronautics?

A. Sometime in the first part of May.

Q. Did you know or do you know of your own knowledge whether or not any documents, letters or other information that was kept from Mr. Smith?

A. Yes.

Q. Would you relate that to the court, please?

A. Well, I know that after Mr. Smith left there was mail that came there for him and letters that was never forwarded to him and some that was destroyed.

The Court: You mean that was after he left?

(Testimony of Emily Hammes.)

The Witness: Yes.

The Court: During the time he was employed there do you know of any information that was withheld from him?

The Witness: No, I don't.

Q. (By Mr. Kipnis): Emily, do you know of any books or records that were not accepted for delivery until Mr. Smith left? [117]

Mr. Peterson: We object to that, your Honor.

The Court: Read the question.

(Question read.)

The Court: She may answer the question if she knows.

The Witness: Well, I can't remember, your Honor, but I do remember—I just can't remember when it was but there was a box of books that was in the post office for quite some time and they were finally brought out there. They were books that were supposed to have been delivered to the students but I don't remember the dates—just when it was.

The Court: Was that because they were c.o.d.?

The Witness: No.

Mr. Kipnis: Would you read the question and answer?

(Question and answer read.)

The Court: Do you know whether it was during the time when Mr. Smith was there or afterwards?

The Witness: Well, that was after he left—after they had the first meeting.

(Testimony of Emily Hammes.)

The Court: That was after he left?

The Witness: Yes.

Q. (By Mr. Kipnis): Did anyone tell you not to pick up those books or not to have them delivered?

A. No. I was never supposed to get them.

Q. Well, how do you know there was—there was a package in the post office? [118]

A. Well, from just hearing the talk in the office.

Q. Emily, who made up the vouchers?

A. I made some of them and Mrs. Welcom made some of them.

The Court: Show the witness these vouchers and ask her if she made any of them.

Mr. Kipnis: If your Honor will bear with me I would like to try the case in my own way.

The Court: I am interested in the truth. I am not interested in the way you try your case. I want to bring out the truth.

Mr. Kipnis: I think your Honor should bear with the defense.

The Court: I don't care to hear any more comments from counsel. What we want is the facts and the truth.

Q. (By Mr. Kipnis): Did you make up this voucher dated March 18? Would you remember that?

The Court: Refer to the exhibit number, counsel, so we will know which one you are referring to.

Mr. Kipnis: I believe that is exhibit number——

The Clerk: Government's Exhibit 4, your Honor.

(Testimony of Emily Hammes.)

Q. (By Mr. Kipnis): Exhibit No. 4.

The Witness: I have no way of knowing whether I made this up or someone else did. They are all made out in a certain form and they all have to be just like this. They [119] are never initialed. I can't tell whether I made this out or not. I don't remember. I made out some like this but I don't remember the names of the boys or anything so I don't remember whether I made this particular one or not. They all have to be made on this same form and with the same information.

The Court: I would like to have the reporter read the answer.

(Answer read.)

Q. (By Mr. Kipnis): I show you this exhibit marked No. 6. The date of this one is April 14. Will you look at it and see if you can recognize that as one you made out?

A. I don't know whether I made it out or not.

Q. What was the office practice then as to making out these vouchers? By that I mean who would do the dictating?

A. I don't remember of anyone ever dictating a voucher. We took it off the records that were on cards and out of the files.

Q. Then as far as you were concerned you just took the records out of the file. Did you compare the receipts that were in the students' files and make out the vouchers? Is that it? A. Yes.

Q. Do you know whether Mrs. Welcom had the same [120] office practice as well?

(Testimony of Emily Hammes.)

A. I believe she did.

Mr. Kipnis: Nothing further, your Honor.

Mr. Peterson: Just a moment. That is all.

The Court: Call your next witness.

Mr. Kipnis: I will call Mr. Nivelle who was subpoenaed on behalf of the school with the corporation books and records.

The Bailiff: This witness claims he has not been subpoenaed.

The Court: He is in court, is he not?

The Bailiff: Yes, your Honor.

The Court: That is all I need.

CHARLES B. NIVELLE

called as a witness on behalf of the defendant, being first sworn, was examined and testified as follows:

Direct Examination

By Mr. Kipnis:

Q. Will you state your full name?

A. Charles B.

Q. Do you have the books and records of the Arizona Institute of Aeronautics, Incorporated, with you? A. Not with me, no, sir.

Q. Do you know where they are?

A. Part of them have been turned over to [121] Mr. Peterson and part of them are in the auditor's office. Those pertaining to this trial I believe are in Mr. Peterson's possession.

Mr. Kipnis: If your Honor please, a subpoena

(Testimony of Charles B. Nivelle.)
was issued and served, duces tecum, for the books and records of this corporation. I would like at this time to make a demand that they be produced whether Mr. Peterson has them or someone else has them or the school.

The Court: If anyone under the jurisdiction of this court has the books and records I am perfectly willing they be produced. Do you have any of the books, Mr. Peterson?

Mr. Peterson: I wouldn't classify them as books. There were some records of some kind that had no bearing on this case, but I will produce anything that they want.

The Court: Whatever you have that was obtained from the corporation I am perfectly willing be produced.

Mr. Peterson: I have a report here made by——-

The Court: He wants the books and the records of the corporation.

Mr. Peterson: Shall I go to the office and bring them?

Mr. Kipnis: That was the purpose of the subpoena duces tecum—to have the books here.

The Witness: Your Honor, I was not subpoenaed at all. I had the records and I brought what I had that I was asked to bring and gave them to Mr. Peterson and that is all I have [122] received. There was no subpoena whatever.

The Court: Can you produce them?

Mr. Peterson: They are on my desk.

(Testimony of Charles B. Nivelle.)

The Court: You had better get them and in the meantime this witness can be withdrawn.

Mr. Kipnis: Very well, your Honor.

The Court: Mr. Witness, you will remain in the courtroom. You are not excused. Haven't you another witness you can call, counsel?

Mr. Kipnis: If the court please, we have only one other witness and that is the defendant himself.

The Court: And his examination will take some time.

Mr. Kipnis: I would not like to have his testimony interrupted so with your Honor's permission I would like to ask for a few minutes recess or wait until Mr. Peterson comes back.

The Court: We will take a five-minute recess at this time. Ladies and gentlemen, you will bear in mind the admonition of the court heretofore given.

(Short recess.)

The Court: Do you stipulate, gentlemen, the jurors are all present and in the jury box and the defendant is in court with his counsel?

Mr. Wheeler: So stipulated.

Mr. Flynn: So stipulated. [123]

The Court: You may proceed.

Direct Examination

By Mr. Kipnis:

Q. Will you state your full name?

A. Charles Nivelle.

Q. Will you state your present position in this

(Testimony of Charles B. Nivelle.)

school? A. President and general manager.

Q. I show you this document here. Can you identify this?

A. That is the record book of the corporation.

Q. That is the minutes of the meetings?

A. Yes.

Q. Are these loose leaf pages?

A. Some of those may be other things. I haven't had a chance to run through it.

Q. I see. Would you look at this record book and let me know what office Mr. Fred Streicher held in October of 1948 in the corporation?

A. I don't believe I could tell you that from this record. I don't know. I was not in the corporation. I knew nothing of it at that time and I don't know whether I can tell from this or not without going through it—without reading the whole thing.

Q. Well, as far as you know this record book is substantially [124] correct, is it not?

A. That record book is not necessarily absolutely correct because I don't know—I wasn't here when the book was formed. That is the record that was turned over to me.

Q. Would you know Mr. Streicher's signature if you saw it? A. No, sir, I couldn't swear to it.

Q. Would you know who the president of this corporation was at the beginning?

A. From the record only.

Q. Well, do you know?

A. I know the records say G. Clifford Smith or

(Testimony of Charles B. Nivelle.)

Paul Ehlers was the president and G. Clifford Smith was the director.

The Court: You say you are now president and general manager of this school?

The Witness: Yes, sir.

The Court: When did you become such?

The Witness: About June 23rd, sir. I am not the Lt. Nivelle that was the original stockholder. I am a brother.

Mr. Kipnis: If your Honor please, I am looking for the vouchers which were subpoenaed starting with February 1st and 2nd and which apparently are not here.

The Witness: Look in the other folder. [125]

Q. (By Mr. Kipnis): Would you be familiar with this document?

A. You mean this one in particular?

Q. Yes, this one in particular.

Mr. Peterson: What is the date of that?

The Witness: March 9.

Mr. Peterson: I think we can save some time here. This witness testified he had nothing to do with this company until after June 23rd. All those matters were before June 23rd.

The Court: He can answer the question more quickly than you can make an objection. If he wasn't there at the time he isn't familiar with it.

The Witness: That is the answer, sir.

Q. (By Mr. Kipnis): I didn't hear your answer.

A. The answer is no, I am not familiar with it.

Mr. Kipnis: Nothing further from this witness at this time.

The Court: Any questions?

Mr. Flynn: No questions.

The Court: That is all. Do you want this witness to remain here?

Mr. Kipnis: I would like the court to have him remain.

The Court: Very well. Call your next witness.

Mr. Kipnis: Mr. Smith, will you take the stand?

G. CLIFFORD SMITH

called as a witness on behalf of the defendant, being first sworn, was examined and testified as follows:

Direct Examination

By Mr. Kipnis:

Q. Will you state your full name, please?

A. G. Clifford Smith.

Q. Will you state your position with the Arizona Institute of Aeronautics from its inception to about the beginning of 1949, to January 1, 1949?

A. From the beginning I was one of the original organizers of the Arizona Institute of Aeronautics.

At the initial incorporation meeting, held sometime in September in the office of the attorney, I was elected to the position of president originally and then at the request of the other stockholders I was given the position of treasurer.

As treasurer I was in control of the funds only insofar as my own signature was concerned. Two signatures were required on all checks.

(Testimony of G. Clifford Smith.)

I secured the equipment for the school in New York City and various places in Arizona.

I employed the head instructor who met with the approval of the other stockholders.

Q. Will you state his name, please? [127]

A. William P. McConnell. And I employed all of the employees in the school.

I did all of the original negotiating with the Veterans Administration.

Q. Now, would you state the arrangement concerning the operation of this school—that is among the incorporators?

A. The division of work was set up so that Mr. William P. McConnell had complete charge of all the instruction in the shops.

Mr. Fred Streicher had charge of all records and books of the corporation and it was my duty to formulate policy; contact the Veterans Administration and in that respect I depended upon Mr. McConnell and Mr. Streicher to supply me with the necessary information.

Q. Now in connection with that where did you get your information concerning the list of tools and books?

A. The information was given to me by Mr. McConnell who had previously been an instructor at an aeronautical school in New York City and who advised me that they were the necessary tools to have and advised me as to their approximate cost.

I took his information to the Veterans Adminis-

(Testimony of G. Clifford Smith.)

tration, using that for my discussion with them.

Q. Now, did you submit that list of tools and that list of estimated costs to the officers of the Veterans [128] Administration?

A. Yes, sir, I did. I took the list as submitted to me by Mr. McConnell with his estimated cost figures and took them and submitted them to the Veterans Administration officials.

Q. When did you receive notification that that list was a correct or approved list from the standpoint of the Veterans Administration?

A. Well, it was indicated by the Veterans Administration in the original negotiations that the list would be satisfactory.

That list was then made a part of the contract as submitted to the school by the Veterans Administration. It was made a part of the memorandum agreement which was dated January 30th or 31st and was later incorporated in the contract that was issued sometime in March.

Q. What was your understanding of the preliminary negotiations with the officers of the Veterans Administration on the basis of trying to work out a proposition where the school had not been in existence for the six months period?

A. Well, in the discussions with the Veterans Administration it was pointed out to them that we had no cost experience to go on. They apparently understood the situation because of the waiver of the six months operating clause and were content

(Testimony of G. Clifford Smith.)

with the estimated cost analysis of [129] tools, equipment and what not.

It was also the understanding that we could bill for tools and materials used upon receipt of the approval of each student by the Veterans Administration regardless of when that approval should come in. We could only bill for tuition after the services had been rendered.

It was also the understanding that because of the quantity of tools that were being ordered in large lots that there would be delay in delivery of some of the items. That was confirmed through discussions with Sears Roebuck, which were handled by Mr. Streicher, Mr. McConnell and myself, both singly, individually and on several occasions together.

Q. Once this contract or memorandum agreement was approved do you know whether or not orders were placed to secure all of the tools, books and equipment? A. Yes, sir, I do.

Mr. Flynn: We object to that as not the best evidence. If there was any order the writing or record of it would be the best evidence.

Mr. Kipnis: Your Honor, I have to establish whether or not there were any orders.

The Court: He has answered the question. What good would it do to strike the answer?

Q. (By Mr. Kipnis:) Where did you place the orders?

A. Orders for the tools that were to be used by

(Testimony of G. Clifford Smith.)

the [130] students were originally placed with the Tucson Auto Parts through Mr. Streicher. When they indicated that they were unable to deliver the tools in quantity except by prepayment, the orders were then placed with Sears Roebuck who promised 10 to 15-day delivery because they had to be secured out of town in the quantity that we wanted.

Q. Where were the orders placed for the books?

A. The orders for the books were placed with the printing office of the Federal Government in Washington, D. C. They were also placed through a publishing house in New York City. I don't recall the name of the publishing firm.

There were, I believe, two different firms in New York City with whom orders were placed.

Q. I show you a document here and I would like to know if you can identify this?

A. Yes, sir, I can.

Q. Will you state what that is?

Mr. Peterson: Just a moment. We object to it. We would like to see what it is. We don't know what it is.

Mr. Kipnis: Have you any objection to him stating what it is?

Mr. Peterson: We object to any questions asked about this document. It doesn't have anything to do with the allegations in the indictment.

The Court: May I see it? What is the contention of [131] counsel as to the admissibility of this paper?

(Testimony of G. Clifford Smith.)

Mr. Kipnis: If you Honor please, it was testified to by officers of the Veterans Administration that this contract was not actually received back in Tucson until late in March.

I would like the court to know and we think it has a direct bearing upon the intent and knowledge of this defendant, because of a practice that has been established.

Mr. Peterson: Well, I don't think counsel is stating the testimony correctly. Mr. Robbeloth testified that the contract itself was in full force and effect and distributed on March 9, 1949. There is nothing in that document there that has anything to do with the charges in this case. I don't even know what it is.

The Court: I don't see any materiality, counsel. It is just another voucher covering another transaction which is not involved in this case.

Mr. Kipnis: If your Honor please, this is one of a series of transactions where there was a course of conduct which was set in practice with the knowledge of the Veterans Administration.

The Court: Just a moment, counsel. The Veterans Administration can't waive the provisions of the statutes of the United States. I don't think this is material.

Mr. Kipnis: If your Honor please, the transactions were one. [132]

The Court: Do you contend those transactions were handled just as these were?

Mr. Kipnis: Yes.

(Testimony of G. Clifford Smith.)

The Court: Then that would be a good thing for the FBI to have knowledge of.

Mr. Kipnis: I believe so. And I think it is rather unsual that the corporation which has entered into every one of these——

The Court: Counsel, one violation does not justify another.

Mr. Kipnis: But if your Honor please, this is a method of doing business that the corporation was engaged in before this man entered into this charge —into the allegations that are charged here.

Mr. Peterson: No corporation can violate——

The Court: Counsel, let us not argue about that. I am going to sustain the objection.

Mr. Peterson: I object to it as immaterial and not bearing on the issues in this case.

Q. (By Mr. Kipnis): I show you Government's Exhibit No. 4 and I would like you to relate to this court and this jury the circumstances under which you signed this certification.

A. This is a voucher.

Mr. Peterson: Just a moment. I object to that question. [133] It is absolutely indefinite. It isn't any particular question.

The Court: Counsel, I feel the defendant should have equal latitude in making any explanation that may justify his conduct within reason. I am going to overrule the objection and let him tell his story.

The Witness: Thank you, sir. This is a voucher that was submitted to the Veterans Administration by the Arizona Institute of Aeronautics.

(Testimony of G. Clifford Smith.)

It is one of many vouchers made up in the office. The vouchers are made up by or were made up by the girl employed in the office who took from the files the information necessary, such as the listing of the names of the approved students and after filling them in they would be presented to an officer of the company for signature.

In that particular voucher I signed it after checking the receipts signed by the students which showed that all of the tools had been issued and received by them.

Q. (By Mr. Kipnis): I would like to show you these instruments here. Will you tell the court what that document is?

A. This is a list of tools which is a receipt for tools issued and received by a student.

Q. What is the signature on that?

A. Antonio V. Bustamente.

Q. Do you recall whether that receipt or an original [134] receipt of this—similar to this, was in the files before you signed that voucher?

A. The original receipt was in the file because they were checked when I signed the vouchers, because it was not my duty to sign vouchers.

Mr. Kipnis: I would like to have this marked Defendant's Exhibit A and offer it in evidence.

The Clerk: Defendant's Exhibit A for identification.

(The document referred to was marked Defendant's Exhibit A for identification.)

(Testimony of G. Clifford Smith.)

The Court: May I ask counsel, if you have receipts for each one of these parties?

Mr. Peterson: If they are the ones testified or whom we stipulated to they can be admitted right now.

Mr. Kipnis: These are the ones who testified.

The Court: Submit them as one exhibit.

Mr. Kipnis: In connection with all the different witnesses.

The Court: Mark them as one exhibit instead of having the clerk do a lot of clerical work. I am trying to save him some trouble.

The Clerk: Thank you. These will be Defendant's Exhibit A in evidence.

(The document referred to was marked Defendant's Exhibit A and received in evidence.)

The Witness: Do you wish me to go on?

Mr. Kipnis: Just a moment.

Q. (By Mr. Kipnis): In your duties as director did you have occasion to question some of the students as to whether or not they received all the books and tools and so forth?

A. No, sir, I did not have occasion to question the students on it because that duty was delegated to Mr.——

The Court: You have answered the question. Just answer counsel's questions.

The Witness: I am sorry, sir.

Q. (By Mr. Kipnis): At the time when you

(Testimony of G. Clifford Smith.)

executed this particular voucher did you certify that the bill submitted was correct and that you had not previously received payment for it?

A. I did. There is a certification on here to that effect, that the bill was correct as submitted.

Q. Now, what was your understanding of your signature being required to this voucher?

A. That an officer of the company was required to sign all vouchers submitted to the Veterans Administration and since I was the only available one I signed this one as well as the other voucher.

Q. Do you know of your own knowledge the date of the first particular voucher that was submitted?

A. Yes, sir, I do. The first voucher was submitted within one or two days after receipt of the contract from the Veterans Administration, which was prior to the date on this voucher.

Q. Do you know who signed that first voucher?

A. Fred W. Streicher signed the first voucher.

Q. Do you know how many vouchers—that is the total in dollars and cents, that were signed up until March 18th or April 14th?

A. Up until April 14th?

Q. Yes.

A. There was approximately $3,200 worth of vouchers submitted to the Veterans Administration by April 14th.

Q. And as far as you know was the procedure followed—the same procedure followed in submitting each particular voucher?

(Testimony of G. Clifford Smith.)

A. The same routine procedure was followed in submitting each voucher—that is the making up of the voucher by the office girl and the checking with the record and the signing by an officer.

Q. Mr. Smith, did you receive any benefit or profit as a result of this—of either of these two vouchers? A. No.

Mr. Peterson: We object to that. That is not material in this case. [137]

The Court: The answer will be stricken and the jury instructed to disregard it as immaterial.

Mr. Kipnis: Nothing further, your Honor.

Cross-Examination

By Mr. Peterson:

Q. Mr. Smith, who first made the original contact with Sears Roebuck in regard to the tools which were to be delivered to these boys?

A. The original contact was made by Mr. McConnell and myself together.

Q. Was that the time when you arranged with the credit manager for credit?

A. No, sir, it was not.

Q. When did you arrange that credit agreement with Sears Roebuck?

A. There was no arrangement of credit made with the credit manager. Mr. McConnell and I contacted the manager of the hardware department of Sears Roebuck and after Mr. McConnell had passed upon the acceptability of the tools that Sears Roe-

(Testimony of G. Clifford Smith.)

buck had to offer, I authorized the manager of the hardware department to place an order and deliver them to the school. They were to be delivered on a c.o.d. basis.

It was later that a credit arrangement was made with Sears Roebuck.

Q. How much later? [138]

A. Well, I believe it was sometime in February that a credit arrangement was made because of our inability to pay for the tools completely at the time.

Q. Now, you stated on direct examination that you ordered other tools. From whom did you order those?

A. I stated that originally tools were ordered from the Tucson Auto Parts. They were ordered by Mr. Fred Streicher and because of the inability of the Tucson Auto Parts to supply them Mr. McConnell and I went to Sears Roebuck.

Q. Well, I mean after you distributed the first tools to the students out there, tools received from Sears Roebuck, was there any further orders?

A. There were additional orders placed with Sears Roebuck as new students were enrolled in the school.

Q. Was that before you left or after you left?

A. We started approximately four or five classes of students before I left. With each class of students we ordered tools.

The Court: When you talk about "additional tools" you mean additional kits of tools?

(Testimony of G. Clifford Smith.)

The Witness: Additional sets, yes, sir.

The Court: The original order was for certain specified tools?

The Witness: That is correct, the complete tools for [139] each student.

The Court: Then as you ordered additional tools that means additional kits?

The Witness: That is correct, sir.

Q. (By Mr. Peterson): Now, when you say this voucher was prepared, Government's Exhibit No. 4, that you have in your hand, did you go to the files yourself and personally obtain the receipts which you say you took as the facts in order to sign that voucher?

A. I personally checked the receipts signed by the students. I did not fill out the voucher.

Q. Where did you find them?

A. Pardon me?

Q. Where did you find those?

A. They were in the personal file of each student.

Q. You went down and took each one of those files out?

A. Yes, sir; because I was not familiar with what students were there or whether the tools had been issued.

Q. Did you check to see whether or not those students had received all of their equipment?

A. That was not part of my duty.

Q. You were the general manager and director?

A. That is correct, sir.

(Testimony of G. Clifford Smith.)

Q. And you signed that voucher? [140]

A. That is correct.

Q. Did you read the top of the voucher?

A. I did, sir.

Q. You certified that you knew that the goods had been delivered and were delivered at the time of signing that voucher and issuing that voucher?

A. I certified that the bill was correct, sir.

Q. And you also—did you read the top of that?

A. Yes, sir, I did.

Q. That the goods were delivered and that you knew that? A. (No answer.)

Q. That is what you certified to?

A. Yes, sir.

Q. Did you make any check whatsoever to see that that was a fact—the affidavit made on the vouchers issued to the Government?

A. I did not check each student.

The Court: May I ask a question, Mr. Smith? You were not able to get a full kit of tools from Sears Roebuck, were you?

The Witness: Not at one time.

The Court: I mean when the initial order was placed they were not able to completely fill the list of tools that were specified in the contract? [141]

The Witness: That is correct.

The Court: While you were there did you get additional tools from anybody?

The Witness: We received additional tools to fill out the total list, from Sears Roebuck from time to time.

(Testimony of G. Clifford Smith.)

The Court: And these students, as I understand it, received the additional tools on March 18th?

The Witness: I don't know whether they had received them, your Honor, because I didn't distribute them or handle them.

The Court: You have heard the evidence here, Mr. Smith?

The Witness: Yes, sir, I have.

The Court: And the statement of the students that they received only part of their tools and the rest were not received until after you had severed your connections with the institution?

The Witness: I heard that, sir.

The Court: And is that true?

The Witness: I do not believe it is completely true, sir.

The Court: Well, you knew whether or not the tools had been delivered to the institution?

The Witness: No, sir, I did not.

The Court: Had anybody else ordered tools besides yourself? [142]

The Witness: Yes, sir.

The Court: Who?

The Witness: Mr. Streicher kept checking with Sears Roebuck as well as myself and Mr. McConnell. There were tools delivered during various periods when I was in Phoenix or out of the office.

The Court: Then as I understand your testimony you didn't know of your own knowledge whether these receipts reflected the truth or not?

(Testimony of G. Clifford Smith.)

The Witness: Of my own knowledge no, sir.

The Court: You relied upon these statements?

The Witness: That is correct, sir, I did.

The Court: And that is your contention here today?

The Witness: That is right, sir. I couldn't handle every phase of it myself.

The Court: The only thing I am asking you if that is your position?

The Witness: That is correct, sir.

Q. (By Mr. Peterson): You mean to say that you signed a voucher which was to be presented to the Government, an instrumentality of the Government, without checking up and knowing whether it was the truth or not?

A. I contend that you have to depend to a certain extent, sir, upon other people and that I had checked the [143] fact that those tools were issued and a receipt signed.

Q. Yes, but Mr. Smith, you knew at the time that this voucher was issued that all of the tools had not been delivered, didn't you?

A. Of my own knowledge I did not know that, Mr. Peterson.

Q. What were your duties out there?

The Court: Ask the question the other way. Did he know that they had been delivered?

The Witness: May I have the question again?

The Court: Did you know that they had all been delivered?

(Testimony of G. Clifford Smith.)

The Witness: I know that there were complete kits issued to various students and that there were some students who did not have complete kits and some of the students had more tools than others. Not all of them had the same tools because of the limited quantity of each item delivered.

Q. (By Mr. Peterson): Well, Mr. Smith, I am asking you about the particular ones whose names are contained in that voucher which you signed.

A. Yes, sir. What is the question?

Q. Did you know whether they had not or had been delivered to them?

A. To my knowledge they had been delivered, Mr. Peterson. [144]

Q. They had been delivered? A. Yes, sir.

Q. Was anything ever said to you about any further tools which were to be delivered before you left the institution?

A. Yes, sir. Mr. Streicher and Mr. McConnell kept telling me that the complete tools ordered had not yet been delivered. As a result I constantly kept checking with Sears Roebuck.

Q. And they were not delivered until after you left the school, is that correct?

A. No, sir, that is not completely correct.

Q. I mean for these particular boys that are mentioned in this voucher?

A. I can't answer that, sir. I don't know to my knowledge that they were.

Q. Now, you say it was the understanding that

(Testimony of G. Clifford Smith.)

you could bill for goods—bill the Veterans Administration on a voucher for goods at any time you desired whether they were delivered or whether they were not?

A. No, sir. It is my—it was my understanding that you could bill for tools and expendable materials immediately after receiving the approval of the student by the Veterans Administration, regardless of when, during the month, that approval came in.

Insofar as tuition was concerned, regardless [145] of when the approval of the student came in, we could only bill at the end of the month.

Q. Well, you are not asking the question I asked you. A. I am sorry.

Q. I asked you if you had the understanding that you could bill for these tools at any time whether they had been delivered or not, if they were supposed to be delivered at some future time. Is that your understanding?

A. It was my understanding we could bill for the tools as they were received by the school.

Q. And delivered to the student?

A. No, sir; as they were received by the school.

Q. Did you ever read that before? Did you read it before you read it here in court today?

A. Yes, sir.

Q. That isn't what that says, is it?

A. No, sir.

The Court: That is argumentative, counsel.

(Testimony of G. Clifford Smith.)

Q. (By Mr. Peterson): Where did you get the understanding from?

The Court: Just a moment. The voucher is here and it speaks for itself.

Mr. Peterson: I am trying to ask him what he thought about that statement on the document. He said that he had [146] an understanding——

The Court: He said he had an understanding?

Mr. Peterson: Yes; he stated that in his direct examination.

The Court: Very well, you may proceed.

Q. (By Mr. Peterson): Did you think that anybody in the employ of the Government could authorize you to violate that statement—the statement that is on that document that you have in your hand?

A. No; there was no violation authorized by anyone in the Government. May I clarify the other answer?

Q. Your counsel can do that.

The Court: I will let him clarify it.

The Witness: The reason for that was that the school held the responsibility of the tools for the entire time the student was enrolled in the school. They were to be retained by the school, on the school premises, and issued to the students only as they needed them—as they progressed from shop to shop which did not make it of paramount importance that the student receive the tools. but that the school received the tools.

(Testimony of G. Clifford Smith.)

The Court: Then Mr. Smith if that was true why did you check the receipts? Why did you think it was necessary to check the receipts to find out whether the tools had been delivered to [147] the students?

The Witness: Because, sir, I was not signing vouchers for the school and this was the first voucher presented for my signature and in order to make sure that the voucher was correct I checked.

The Court: But you said it was your understanding when the tools were delivered to the school that you could then bill the Government for them?

The Witness: That is correct, sir.

The Court: And yet you thought it was necessary to check the receipts to be sure the students had received the tools?

The Witness: Because this was an unfamiliar duty of mine, sir.

Q. (By Mr. Peterson): You stated on direct examination, Mr. Smith, that you placed further orders for tools? A. That is right.

Q. Do you know where you could find copies of those orders?

A. I don't believe I would be able to find copies of those orders, Mr. Peterson.

Q. What institution did you say you ordered them from?

A. Sears Roebuck & Co. Originally an order was placed with the Tucson Auto Parts in Tucson.

Q. Did you hear the testimony of Mr. — the

(Testimony of G. Clifford Smith.)

man [148] from Sears Roebuck when he told us what he had here in court included all the orders he ever had from your school?

A. I heard that.

Q. Up to the time you left.

A. I heard that.

Q. Then you never placed any further orders?

A. After the dates that he mentioned?

Q. Yes, after the original order.

A. The orders were placed verbally with the manager of the hardware department, Mr. Peterson.

Q. Did you make any showing on the books of the company? A. Only as——

Q. Or on the records?

A. Only as they were received by the company.

Q. Well, did you have any documents out in the Arizona Institute of Aeronautics which showed that you had received any further tools or books during your period out there?

A. Yes, sir. There were receipts for all tools and books that were delivered at the school. They were received by Mr. Streicher and kept by him.

Q. Kept by him? A. Yes.

Q. Who kept the books of this [149] organization? A. Mr. Streicher.

Q. All the books?

A. Yes, sir; they were his responsibility.

Q. Did he keep the personal files of these gentlemen or boys you testified to?

(Testimony of G. Clifford Smith.)

A. Yes, sir, he did.

Q. Who was the regular bookkeeper for the corporation?

A. The girl employed to do the posting in the books was Mrs. Hammes who worked under Mr. Streicher.

A. Did she work under you?

A. Indirectly she did.

The Court: Mr. Smith, you testified that you were the treasurer and took care of the payment of bills?

The Witness: That is correct, sir.

The Court: Did you pay these bills that are represented by Government's Exhibit No. 2?

The Witness: These are the Sears Roebuck bills?

The Court: Yes.

The Witness: I paid some of the bills issued by Sears Roebuck to the company. My signature was not the only authorized signature.

The Court: I understand that but you audited them—you okayed them?

The Witness: Yes, sir; I did. There was a dual signature required on checks and I did pay [150] part of them.

The Court: Do you know of any other tools that were purchased besides those that were purchased from Sears Roebuck?

The Witness: During the time that I was connected with the company, you mean?

(Testimony of G. Clifford Smith.)
was instructed that in the event tools were not delivered to cross them off the tool list and issue new receipts as the additional tools came in because those records had to be correct for the inspection of the Veterans Administration.

Q. Was the Veterans Administration in continual check with you—that is did you have rather frequent visits by some officer or member of the Veterans Administration during your term as director?

A. Well, if there wasn't a visit from a representative of the Veterans Administration there was always telephone contact so that almost daily I was checking with the Veterans Administration as to the proper procedures that I should operate under.

Q. In Tucson as well as Phoenix?

A. In both places.

Mr. Kipnis: Nothing further, your Honor.

A Juror: May I ask a question? [153]

The Court: You may ask the question but the witness will not answer it until I direct him to.

A Juror: Did he as treasurer personally receive the checks that correspond with these vouchers?

The Court: You might show him the checks. Can you answer that question?

The Witness: Yes, sir.

The Court: Have you seen those?

The Witness: Yes, sir, I saw them this morning.

Mr. Kipnis: Will you answer the question?

(Testimony of G. Clifford Smith.)

The Witness: No, I did not directly receive the checks issued to the school.

A Juror: Were the checks deposited to the credit of the corporation immediately upon receipt of the checks?

The Witness: Yes, sir, they were without exception. The checks were picked up in the post office and brought to the school and then deposited in the account of the corporation. I did not even endorse the majority of the checks. In some cases they were taken direct from the post office to the bank.

Mr. Wheeler: We might stipulate that one check bears Mr. Smith's signature for deposit and there is some unknown signature on the other one. We haven't been able to make out the endorsement on the other one, your Honor, but it is stamped by the Institute and endorsed by some unknown [154] party.

The Court: Do you know the signature?

The Witness: No, I do not know the signature but I may be able to explain it.

The Court: Your endorsement is not on the check.

The Witness: No, sir.

Mr. Peterson: I don't think, your Honor, no matter who cashed the check that that has anything to do with this particular case. It is who filed the vouchers.

The Court: Just a moment. I will take care of

(Testimony of G. Clifford Smith.)

that in my instructions. Do you have any questions?

Mr. Peterson: No questions. That is all.

Mr. Kipnis: The defense rests.

The Court: Any rebuttal?

Mr. Peterson: No, your Honor.

The Court: How long do you want to argue?

Mr. Peterson: Very short time for me, your Honor. I think about 10 minutes.

Mr. Wheeler: May we have a few minutes prior to that, your Honor? May we have a few minutes before closing?

The Court: You mean you want a recess?

Mr. Wheeler: Yes.

The Court: Very well, we will take a recess at this time.

Mr. Wheeler: We have rested our case and presume there is no rebuttal. [154]

The Court: So it is ready for argument?

Mr. Wheeler: Yes.

The Court: And you want a recess before you argue?

Mr. Wheeler: Yes.

The Court: Very well, we will take a recess for a few minutes at this time and the jury will bear in mind the admonition of the court heretofore given.

(Short recess.)

The Court: Do you stipulate, gentlemen, that

the jurors are present in the jury box and the defendant is in court with his counsel?

Mr. Peterson: So stipulated, your Honor.

Mr. Wheeler: Yes, your Honor.

The Court: You may proceed.

Opening Argument on Behalf of Plaintiff

By Mr. Peterson:

Ladies and gentlemen of the jury, I don't intend to take a great amount of time arguing the testimony in this case. It has been short, brief and concise.

The court has told you what the issue in this case is as to each count of the indictment, and that is to determine whether or not the defendant in this case signed a voucher and filed it with a Government agency knowing the same to have been false and before the goods were delivered.

I will ask you before you determine [156] your verdict in this case to look at Exhibit No. 4 and read the printed statement made at the heading of that document, that this defendant was aware of at the time he filed that document or should have known from his position which he held in this school that at the time that he swore to that—that he signed that document and filed it with an agency of the Government that the goods were delivered and in the hands of the persons to whom they were supposed to have been delivered.

Now, you heard these boys come here on the wit-

ness stand and testify very frankly. They said at the time this voucher was filed, and on the back of this you will see the name of each one of these boys who appeared here in regard to the first voucher, which was filed for $700 and some odd dollars. These boys appeared here and said they didn't receive those tools. They hadn't all the tools. They hadn't all been delivered.

They read from the document to refresh their memories as to that portion of the goods which they had not received—tools, and they had only received three books out of the $25.00 worth which were supposed to have been furnished them.

Now, that is the question in this case. That is the whole question. It may seem immaterial to you. It is no pleasant duty for Mr. Flynn and myself to stand here, and the court, and prosecute a man but it is a duty that has to be performed. It has to be performed [157] by our office. It has to be performed by the court because if these things continually go on for all time, the filing of false vouchers with a Government agency, and the Government is very jealous of that particular charge—of the particular charge made in this indictment.

I believe that you folks on the jury, in the light of your own human experience, can realize what has happened in this particular case. I don't have to direct you. I don't have to argue with you about the matter.

I think you can see plainly that a man in the position he was then in at that particular time

should have known and did know that the goods which were supposed to have been delivered to these boys had not been delivered and yet he signed the vouchers in both instances, in Count One and Count Two, and presented to the Government a false claim for the full payment when the claim should have been for a lesser amount.

You will read both of these documents. I imagine there will be some argument by counsel for the defense that the voucher was filed for $100 a piece for each one of these boys. The voucher in its entirety reads $770. It explains there was a 10 per cent discount for handling charges. That was in addition to the charge that he charged for the boys when he hadn't delivered the full amount of books and tools. The Government still gave him $70.00 [158] and there was a 2 per cent discount which brought the check down to $754.60. That is what he received from the Government.

Under the testimony of the Government's witnesses, however, he only delivered to these students approximately $1.65 worth of books and about $58.00 worth of tools.

There is another thing in this instance. Mr. Koldewey's testimony, a representative of the Federal Bureau of Investigation who has no personal interest in this matter, talked to this defendant after this charge was presented and he told him that he knew that only about $50.00 worth of goods and tools had been delivered to these boys, but that he expected them at some other time.

It doesn't make any difference when he expected them. When he signed that voucher and presented it to the Government he said to the Government "These goods were delivered to the place where they belonged." That is what makes it false. They hadn't been delivered according to all the testimony.

These boys had no interest in this matter either. They said they had only received a certain amount which they had been allotted and the school had been allotted for the purpose of books and supplies and tools for them to get an education in the particular line of work they were taking.

That is the charge in this case. It is very simple. You are the judges of the facts in this case. It is up [159] to you to determine what you believe from the testimony of all the witnesses, both for the Government and for the defendant, and it is your purpose in determining the guilt or innocence of this defendant. Thank you.

The Court: Mr. Wheeler.

Argument on Behalf of Defendant

By Mr. Wheeler:

Your Honor and counsel and members of the jury Mr. Peterson would have you believe this is a rather simple case. It is true there is no use in rehashing the facts. They have been presented to you. The presentation of them shows this.

It shows, first, an individual acting for a corporation. You will find the stamp of the Arizona In-

stitute of Aeronautics on these vouchers and countersigned by G. Clifford Smith.

Now, we come to the first question and the judge will instruct you what is reasonable doubt under the circumstances and in these circumstances. And will also instruct what are the constituent elements of fraud.

We come to the first proposition: Was this particular act the act of an official or agent of the Arizona Institute of Aeronautics, a corporation? It is quite true—the judge made this statement and I at this time would like to express the defense's appreciation for the latitude we have had in [160] presenting our case. The judge made this statement that a corporation cannot be imprisoned, but the statute under which this was filed does make provision for fining a corporation.

Now, if this were the act of an individual, then we come down to G. Clifford Smith. If you can remove those elements from your mind we come down to the present indictment upon which he appears before you today.

It is immaterial and the judge will so instruct you, the fact that Smith is married and has children. That has no bearing upon this particular case. That has no bearing upon this indictment.

The Court: Counsel, the Court resents such statements. There is no evidence in this record to show that. It is an attempt by you to bring in a fact before the jury in order to create sympathy. There has been no evidence as to whether the de-

fendant is married or not or has children, and the Court doesn't want a repetition of that.

I want you to confine your argument to the evidence that has been introduced in this court.

Mr. Wheeler: Very well.

The Court: We are all sympathetic with anybody who finds himself in trouble.

Mr. Wheeler: Certainly, thank you.

The gist of this action then resolves itself to knowledge at the time these vouchers were [161] signed.

Now, you people are the sole judges of the credibility of the witnesses that have appeared before you. You have heard the routine in which these vouchers and the knowledge came to the various officers of this institution.

Upon you people now devolves the duty of determining whether Mr. Smith in his capacity as a director knew, prior to the submission of the vouchers, that part of the materials had not been delivered.

The prosecution brings out only one—one subject on that matter and that is Mr. Koldewey's statement. It was not amplified and I am not going to transgress the Court's reprimand again, but I will have you recall that Mr. Koldewey was testifying from his recollection of a conversation that took place several months prior.

The case rests with you, and I say honestly that the ramifications cannot be brought in. The attention you people have paid to the presentation and

the questions that have been asked I think have brought up the salient points and I think those are the points this case should be judged on. If it be judged that way, then we have no exception. Thank you.

The Court: Mr. Flynn.

Closing Argument on Behalf of Plaintiff

By Mr. Flynn:

If it please your Honor, ladies and gentlemen of the jury. [162]

I will try to follow the good example set by the two counsel who preceded me and make my talk to you as brief as I can and at the same time perform the duty that I think is upon me in this case.

You know it is the duty of the United States Attorney or anyone representing the Government or State, or an individual in any sort of an obligation in arguing to the jury, to try to be of assistance to the members of the jury and not try to impose his thoughts or his opinions on the jury but to help the jury form their own opinion, and that is what I am going to try to do.

I am going to try to be of some assistance to you and I am not trying to get you to feel that I am telling you what I think and that is the way you ought to think. I am going to help you make up your minds based upon the evidence in this case.

You have an important duty to perform in this case. We have an important duty to perform. We

have to perform that duty irrespective of any sympathy and we try to perform it without any prejudice or feeling.

The court has a duty to perform in seeing that the evidence is introduced properly and then to instruct the jury on the law in the case. That is an important function of this court and that should be performed and has been performed in fairness to both the Government and the defendant.

Then the case is submitted to you and you have your duty to perform and that is the important part of this procedure because that is the final answer to this case. And in performing your duty you should perform it in a way that will be fair to the Government and to the defendant and not be influenced by any prejudice or by any feeling of sympathy or by anything outside of the evidence in this case. Your decision should depend upon the facts developed here by the witnesses and not upon anything you might imagine or conclusions you might draw without evidence to support it.

The court has said many times during this case and will probably instruct you as to the issues in this case, and the whole issue is very simple. It is whether or not this defendant signed and presented these two vouchers here to the Veterans Administration for the payment of money, knowing that they contained false statements.

There isn't any question but what he presented them so you don't have to worry about that. There isn't any question but what he signed them and there

can't be any question about that, and there can't be any question but that they were false because the evidence is practically uncontradicted here that at the time those vouchers were presented the material had not been furnished to the school, had not been purchased by the school and had not been furnished to the [164] individual students.

The only other element then for you to determine is whether or not the defendant had knowledge of the falsity of these vouchers.

Who was this defendant? Go back to the organization of this company, ladies and gentlemen, and you will find that he was the moving spirit. He was the man who conceived this idea of this school. He was the man who started it. And do you suppose he operated out there and managed that office out there and overseeing this work without knowing what was going on?

He admits, and the evidence is also uncontradicted, that when they purchased these materials, these tools from Sears Roebuck, they couldn't buy all that the list required. The defendant knew that.

Did he ever try to find out when he signed those vouchers, when he said he was so careful to go into the files and get out these receipts, did he make any effort to determine or find out if the things had changed (since he knew when he purchasd this stuff from Sears Roebuck) that he didn't get it all. He didn't have enough to furnish tools required.

Now, it is immaterial. There has been something said here about conducting the school. Maybe the

school didn't need these tools. This was an estimated amount of tools that they thought was needed for this instruction. It isn't [165] a question of whether the school could get along without them. It is a question of whether or not they were furnished to these boys or weren't furnished, and whether or not they put in the claim for them. That is the question. It doesn't make any difference. Maybe they could have gotten along with half the tools but that is immaterial. The question for you to determine is whether or not they put in a claim for something that they didn't furnish. That is all.

Now then I say this defendant said that he made an investigation. He went and got those receipts, but he didn't make any further investigation to find out if these tools had been received from Sears Roebuck. He knew they hadn't been received. You know that he knew they had not been received.

He told this Federal agent down in the jail at that interview in May or June that he had authority from the Veterans Administration to put in vouchers for tools before they were supplied. That is the testimony of this Government agent. And when the defendant was on the stand he was never asked to contradicted that statement. He was on the stand and his counsel never asked him:

"Did you make the statement to the Government agent that you had authority?"

He took the stand, of course, and said he didn't have authority now because he knew that that theory of his defense would not sound reasonable to this

jury and so he didn't take [166] the stand and say that he had that authority. But he didn't deny that he made that statement to the Governmen agent.

If he made that statement to the Government agent. If the Government agent is speaking the truth, then this defendant has not told you the truth on the witness stand because if he told that Government agent that he had that authority in explaining why he presented those vouchers then he knew when he presented them that they were false and that the tools had not been supplied.

Ladies and gentlemen of the jury, I am ready to rest my case upon that statement; but if you don't believe the Government and believe this defendant the only thing you can do is go up to your jury room and bring in a verdict of not guilty. But if you believe the Government agent when he stated that the defendant made that statement to him then your duty is just as plain. You will go up to your jury room and return a verdict of guilty.

That evidence is corrobrated also by this man Streicher who said he discussed, and it is natural that he would discuss the matter with the defendant out there, the man who was really running this school, that these tools had not been supplied and he was told to get a receipt from the boys and go ahead. It was all right. He had everything fixed up. Everything was all right, even the impression that the Veterans Administration didn't care. [167]

Now, that is the kernel of this case, ladies and gentlemen. It doesn't make any difference whether

they had tools out there sufficient to run this school. It doesn't make any difference how they were delivered—when needed or delivered at once. It doesn't make any difference. There is only one thing that does make a difference in this case and that is when he made out those vouchers did he know and I say from all the circumstances in this case we can't go into a man's mind and read his mind and say that he knew this or that he knew that.

The only way we can determine what he knew and what was his intent is by his actions and by his statements and by the surrounding circumstances. And I say every point of evidence in this case points to the fact that this defendant had knowledge that those tools had not been received by the school and had not been delivered to the school, and if that is true and he knew it he is guilty of this charge and it is your duty to find him guilty.

I submit it to you on that basis, ladies and gentlemen.

COURT'S INSTRUCTIONS TO THE JURY

Ladies and gentlemen, it now becomes my duty to instruct you as to the law of this case and under your oaths it is your duty to follow my instructions as to the law. In answering the court's questions when you were impanelled [168] you told me you would follow the court's instructions as to the law of the case and that is your duty.

I am to pass on the questions of law. Under the law I have a right to comment on the facts, but if in my instructions I appear to make any comment

that you consider comments on the facts and you do not agree with my comments, it is your duty to disregard them and not be influenced by them.

I am not going to intentionally tell you what I think about the facts, but I may in some of my comments seem to do so. If I do so you are instructed to disregard such comments because I feel that it is your function to determine the facts.

In the first place this action is brought under a provision of the law which reads as follows:

> "Whoever makes or presents to any person or officer in the civil, military or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States or any department or agency thereof, knowing such claim to be false, fictitious or fraudulent shall be punished as provided by law."

As I stated there are really two issues here. There is no issue as far as the presentation and the execution of this claim is concerned. There is no dispute about that.

The issue is was the claim false and the second is did the defendant know that it was false. [169]

Therefore, the first problem you have to meet when you go to the jury room is to determine first whether the claim was false.

You have heard the evidence and after you have determined that question then you will determine: Did the defendant know the claim was false? That is all. Those are the only two questions.

Now, there has been some comment here about the corporation. The claim was that the defendant signed for and on behalf of the corporation. That is no concern of yours.

Under the theory that has been suggested here anybody that is representing a corporation could file false claims in the name of the corporation and yet they themselves could escape any liability for their misdeed.

So, you are not concerned with any corporation that may be involved and you are not concerned whether or not all the defendants who should be in this indictment are named. You are only concerned with this defendant. Whether there may be other indictments is none of your concern and it is none of your concern whether or not this defendant profited personally by the presentation of this claim.

I permitted the questions to go in and the answers to go in because I felt the facts should be brought before the jury, but whether this defendant personally profited or not is not a concern of yours. He is not charged with embezzlement. [170] He is not charged with stealing from the Government. He is charged with presenting a false claim.

And again I want to emphasize that as far as sympathy is concerned, if you permit sympathy to control your verdict in this case then you are violating your oaths. You are not concerned with the penalty. That is my problem if you find the defendant guilty. That is my problem and my worry and not yours.

I make these statements as a background for your approach as jurors in this case.

The indictment has been read to you and it is in two counts. It has been repeated and repeated and I am not going to read it again, but I want you to bear in mind that the two questions you are going to have to answer are these:

If you find that the claim was not false your verdict should be not guilty. You shouldn't go any further. If the claim was true and correct that ends it.

But if you should find it is false then you can pass to the second question. Did this defendant know it was false, and if he knew it was false then he has violated the statute that I have read to you.

I want to point out that by the finding of an indictment no presumption whatever arises to indicate the defendant's guilt or responsibility for the act charged against him. A defendant is presumed to be innocent at all stages of the [171] proceeding until the evidence introduced on behalf of the Government shows him to be guilty beyond a reasonable doubt. And this rule applies to every material element of the offense charged. Mere suspicion will not authorize a conviction. A reasonable doubt is such a doubt as you may have in your minds when, after fairly and impartially considering all of the evidence, you do not feel satisfied to a moral certainty of the defendant's guilt. In order that the evidence submitted shall afford proof beyond a reasonable doubt, it must be such as you would be willing to act upon in the most important and vital matters relating to your own affairs.

A reasonable doubt is not a mere possible or imaginary doubt or a bare conjecture, for it is difficult to prove a thing to an absolute certainty.

You are to consider the strong probabilities of the case. A conviction is justified only when such probabilities exclude all reasonable doubt as the same has been defined to you. Without it being restated or repeated, you are to understand that the requirement that a defendant's guilt be shown beyond a reasonable doubt is to be considered in connection with and as accompanying all the instructions that are given to you.

In judging of the evidence, you are to give it a reasonable and fair construction, and you are not authorized, because of any feeling of sympathy or other bias, to apply a strained [172] construction, one that is unreasonable, in order to justify a certain verdict when, were it not for such feeling or bias, you would reach a contrary conclusion. And, whenever, after a careful consideration of all of the evidence, your minds are in that state where a conclusion of guilt, or there is a reasonable doubt as to whether the evidence is so balanced, the conclusion of innocence must be adopted.

You are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified upon this trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; by the character of his testimony, or by

evidence affecting his character for truth, honesty and integrity or his motives; or by contradictory evidence. In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness, or may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable men and women. You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relations which he bears to the Government or the defendant, the manner in which he might be affected by the verdict and the extent [173] to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility.

If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jury should distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness' testimony.

The defendant has offered himself as a witness and has testified in the case. Having done so, you are to estimate and determine his credibility in the same way as you would consider the testimony of any other witness. It is proper to consider all of the matters that have been suggested to you in that connection, including the interest that the defendant may have in the case, his hopes and his fears, and what he has to gain or lose as a result of your ver-

dict. You are not limited in your consideration of the evidence to the bald expressions of the witnesses; you are authorized to draw such inferences from the facts and circumstances which you find have been proved as seem justified in the light of your experience as reasonable men and women.

There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that by which men give their attention to any question depending upon evidence presented to them. You are expected to use your good [174] sense, consider the evidence for the purpose only for which it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment; and while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt remains the Government is entitled to a verdict. Jurors are expected to agree upon a verdict where they can conscientiously do so; you are expected to consult with one another in the jury room and any juror should not hesitate to abandon his own view when convinced that it is erroneous. In determining what your verdict shall be you are to consider only the evidence before you. Any testimony as to which an objection was sustained, and any testimony which was ordered stricken out, must be wholly left out of account and disregarded. The opinion of the judge as to the guilt or innocence of a defendant, if directly or inferentially expressed in

these instructions, or at any time during the trial, is not binding upon the jury. For to the jury exclusively belongs the duty of determining the facts. The law you must accept from the court as correctly declared in these instructions.

You are instructed that knowledge is an element of the offense charged in the indictment, and that such knowledge must be established by the same degree of proof as any other [175] elements that enter into the completed offense.

It is psychologically impossible to enter into a man's mind and determine by testimony what the actual knowledge was so you must determine that knowledge from the facts disclosed by the evidence in this case, taking into consideration the conduct of the parties with relation to the matters charged and every circumstance which bears upon the issue keeping in mind a person intends by the natural consequences of his act, intentionally and knowingly done, and when you have considered all the acts of the parties, their relation to each other, the object to be attained, the things that are done, the circumstances under which they move, the motive which prompted the various acts so far as disclosed from the evidence, from all of these things you will determine what the intention of the defendant really was with respect to knowledge.

The verdict rendered must represent the considered judgment of each juror. In order to arrive at a verdict it is necessary that each juror agree thereto. Your verdict must be unanimous.

When you retire to the jury room to deliberate you will select one of your number as foreman and he or she will act as your spokesman in the further conduct of this case in this court.

A form of verdict has been prepared for you in which you [176] will insert your findings of either guilty or not guilty to each of the two counts.

The indictment will be sent to the jury room so you may persue the charge if you are not already quite familiar with it.

I will ask if there are any exceptions to the instructions?

Mr. Wheeler: No, your Honor.

The Court: Both sides are satisfied?

Mr. Wheeler: Yes, your Honor.

Mr. Flynn: Yes.

The Court: Ladies and gentlemen, you will retire to the jury room with the bailiff and you may take the exhibits with you.

Mr. Wheeler: Will the jurors have access to the exhibits?

The Court: Yes. The bailiff will be sworn.

(Whereupon the bailiff was sworn and the jury retired from the courtroom at 4:10 o'clock p.m.

The Court: I assume counsel will remain available.

Mr. Wheeler: We will be here, your Honor.

(At 5:00 o'clock p.m. the jury returned to open court where the following proceedings were had.)

The Court: Do you stipulate, gentlemen, the jurors are all present and in the jury box and the defendant is in court with his counsel? [177]

Mr. Wheeler: So stipulated.

Mr. Flynn: Yes, your Honor.

The Court: Ladies and gentlemen, you have been out now for about an hour and it is getting late. I understand you have not reached a verdict. I want to advise you that if there isn't a verdict by 5:20 o'clock I shall be available after dinner and up until 9:00 o'clock, providing the elevators here are running. If they make provisions for elevator service I will be available until 9:00 o'clock, otherwise I shall receive your verdict in the morning.

It might interest you to know that your conversations have been so loud in the jury room that you have been heard all over this portion of the building

It is very apparent the jury is paying very little attention to the court's instructions. You are arguing as to whether I am a tough judge or not and whether the entire outfit should be in court. Those are things I told you to stay away from. However those have been the subjects of your arguments.

I thought you might be interested to know that. We have heard everything you have said, particularly when your voices were raised. I am making these comments but you don't have to pay any attention to my instructions unless you want to and you are privileged to discuss me, but I don't happen to be the defendant in this case and I am not in-

terested in your [178] verdict except that you arrive at one.

I have instructed the bailiff to provide you with dinner if you haven't arrived at a verdict by 5:20. If you arrive at a verdict after that and I can get in the building I will be here to receive it, but I am not going to put myself in the same position that Judge Speakman is in by climbing stairs at night. If I can get an elevator I will receive your verdict up to 9:00 o'clock. If you haven't arrived at a verdict by that time comfortable quarters will be provided for you in a hotel.

I am making this statement so you will understand why I can't stay here indefinitely and why provisions will be made for you.

With that you are instructed to retire to your jury room.

(Whereupon, at 5:05 o'clock p.m. the jury retired from the courtroom.)

(The following proceedings were had in the absence of the jury.)

The Court: Have you any comments?

Mr. Wheeler: No, your Honor.

(The jury returned to open court at 5:35 o'clock p.m. whereupon the following proceedings were had.)

The Court: Do you stipulate the jurors are present and in the jury box and the defendant is in court with his counsel? [179]

Mr. Wheeler: Yes, your Honor.

The Court: The bailiff advises me you have arrived at a verdict.

The Jury Foreman: Your Honor, they wish a statement made with the verdict if it is possible.

The Court: I will accept a statement by the jury. You may present your verdict to the clerk.

The Jury Foreman: The verdict is guilty but the jury feels he was a victim of circumstances in the case and should be shown leniency.

The Court: I can easily understand that request from the jury.

The clerk will read the verdict and then I will make my comment.

(Verdict read by the clerk.)

The Court: Is that your verdict as read?

The Foreman: Yes, your Honor.

The Court: Do you desire to have the jury polled?

Mr. Wheeler: No, not on the part of the defense.

The Court: I might say with reference to your statement I probably feel about the same toward the case and the defendant as you do because we are all human beings. I am glad to have your recommendation and I will take it into consideration in the disposition of this case.

I haven't looked upon it as so serious but I thought it [180] was important that you arrive at a verdict in the case and dispose of the case and not have it tried again with that expense to both parties.

I will be glad to take your recommendation into

consideration and I am going to refer the matter to the probation officer for report Thursday morning at 9:30.

The jury is excused until tomorrow morning at 10:00 o'clock.

(Whereupon the jury retired.)

Mr. Wheeler: May it please the court, bond has been posted in this case.

The Court: The defendant will remain at liberty on his bond.

(Whereupon, at 5:45 p.m. the above entitled matter was concluded.) [181]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 10th day of May, A.D. 1950.

/s/ JACK O. AMBROSE,
Official Reporter.

[Endorsed]: Filed May 23, 1950. [182]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD ON APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of United States of America, Plaintiff, vs. G. Clifford Smith, Defendant, numbered C-11697 Tucson, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the criminal docket entries and minute entries are true and correct copies of the originals thereof remaining in my office in the city of Tucson, State and District aforesaid.

I further certify that said original documents, and said copies of the criminal docket entries and of the minute entries, constitute the entire record on appeal in said case, as designated in the Appellant's Designation filed therein and made a part of the record attached hereto and the same are as follows, to wit:

1. Criminal Docket Entries.

2. Commissioner's Record, filed June 3, 1949.

3. Indictment, filed June 16, 1949.

4. Defendant's Motion to Dismiss, filed November 8, 1949.

5. Minute Entry of February 14, 1950.

6. Defendant's Motion to Dismiss, filed April 10, 1950.

7. Minute Entry of April 10, 1950.

8. Minute Entry of April 11, 1950.

9. Verdict, filed April 11, 1950.

10. Government's exhibits 1, 2, 3, 4, 5 and 6 in evidence, filed April 11, 1950.

11. Defendant's exhibit A in evidence, filed April 11, 1950.

12. Reporter's Transcript of Proceedings.

13. Minute Entry of April 13, 1950.

14. Judgment, filed April 13, 1950. [183]

15. Notice of Appeal, filed April 20, 1950.

16. Application for Stay of Execution and Relief Pending Review.

17. Minute Entry of April 21, 1950.

18. Minute Entry of April 27, 1950.

19. Bond on Appeal, filed April 27, 1950.

20. Appellant's Designation of Record on Appeal, filed May 23, 1950; filed May 26, 1950.

21. Order extending time for filing and docketing of record on appeal, filed May 26, 1950.

I further certify that the Clerk's fee for preparing and certifying this said record on appeal amounts to the sum of $4.80 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court this 7th day of June, 1950.

WM. H. LOVELESS,
Clerk.

[Seal] By /s/ CATHERINE A. DOUGHERTY,
Chief Deputy. [184]

[Endorsed]: No. 12573. United States Court of Appeals for the Ninth Circuit. G. Clifford Smith, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed June 10, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12573

G. CLIFFORD SMITH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS

Comes Now the above-named appellant and respectfully represents that his Appeal in the above-entitled and numbered matter is based upon the following points:

I.

The Trial Court Erred in Denying Defendant's Motion to Dismiss:

A. The proceedings had before the U. S. Commissioner and before the U. S. District Court were at variance concerning the elements constituting a violation of the respective criminal statutes and that the trial Court erred in denying defendant's Motion to Dismiss.

B. The trial Court erred in ruling that U. S. Code, Title 18, #287 replaced U. S. Code, Title 18, #1001.

C. The trial Court erred in denying defendant's Motion to Dismiss in that the certification of

defendant did not constitute either a making or presenting of a claim. (See Government's Exhibit #4 and Government's Exhibit #6.)

D. The trial Court erred in denying defendant's Motion to Dismiss in that no evidence was introduced to show that defendant "presented" the voucher.

E. The trial Court erred in denying defendant's Motion to Dismiss in that the amount of money stated in the indictment varied from that which appeared on the face of the voucher.

II.

The Trial Court Erred in Excluding the Following Material Evidence Offered on Behalf of the Defendant:

A. The U. S. Manual, U. S. R. and P., governing the application of Public Law No. 346 and of Public Law No. 16. (Veterans' Administration.)

B. Vouchers submitted by the contracting party, Arizona Institute of Aeronautics, Inc., prior to March 18, 1949.

C. Vouchers submitted by the contracting party, Arizona Institute of Aeronautics, Inc., after March 18, 1949.

D. Testimony and other evidence concerning the internal affairs of the Arizona Institute of Aeronautics, Inc., (the contracting party) having a direct bearing upon the credibility, bias and motives of government witnesses.

E. Evidence concerning whether or not the contract of the Arizona Institute of Aeronautics, Inc., government's Exhibit #1, was subject to review and rejection by reviewing officers of the Veterans' Administration.

F. Evidence relating to the issue that the office of the Veterans' Administration did not initiate any proceedings against defendant or against Arizona Institute of Aeronautics, Inc.

III.

The Trial Court Erred in Admitting in Evidence, Over the Objection of Defendant, Incomplete Records. (Government's Exhibit #2.)

IV.

The Court Erred in Making Prejudicial Comments During Trial of Defendant.

V.

The Court Erred in Recalling the Jury in That It Interferred With Its Deliberations and by Admonishments Influenced Its Verdict.

Respectfully submitted this 19th day of June, 1950.

/s/ IRVING KIPNIS,
Attorney for Appellant,
G. Glifford Smith.

Receipt of Copy Acknowledged.

[Endorsed]: Filed June 22, 1950.

No. 12573

IN THE

United States
Court of Appeals
For the Ninth Circuit

G. CLIFFORD SMITH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the United States District Court
District of Arizona

BRIEF FOR APPELLEE

FRANK E. FLYNN,
United States Attorney
for the District of Arizona
Attorney for Appellee

McGREW COMMERCIAL PRINTERY, PHOENIX, ARIZONA

No. 12573

IN THE

United States
Court of Appeals
For the Ninth Circuit

G. CLIFFORD SMITH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the United States District Court
District of Arizona

BRIEF FOR APPELLEE

FRANK E. FLYNN,
United States Attorney
for the District of Arizona
Attorney for Appellee

INDEX

CITATIONS

CASES:

APPELLANT'S AUTHORITIES:

No. 12573

IN THE

United States
Court of Appeals
For the Ninth Circuit

G. CLIFFORD SMITH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the the United States District Court
District of Arizona

BRIEF FOR APPELLEE

STATEMENT OF PLEADINGS AND FACTS

The indictment in this case contains two counts, each charging the defendant, who will hereinafter be referred to as appellant, with violation of Section 287, Title 18, U. S. Code.

The first count charges appellant with presenting to the Veterans Administration, an agency of the United States of America, for payment, a claim in the name

and on behalf of the Arizona Institute of Aeronautics, Inc., hereinafter referred to as "the company". The claim was in the sum of $700.00 and was for books and tools claimed to have been furnished certain trainees attending the school operated by the company.

The second count is identical with the first count, except for the names of the trainees and the amount of the claim.

Each count alleges that the appellant knew the claim to be false in that the trainees had not been furnished with books and tools of the value set out in each voucher. (T. R. 11, 12).

Appellant was the prime mover in the organization of the company and was the head of the school. (T. R. 109).

The company had a contract with the Veterans Administration which provided that the company was to furnish certain tools and books to the trainees. (T. R. 43).

The contract also provided that the company should prepare and certify vouchers for books, supplies and equipment after they were furnished or re-issued. (T. R. 45).

Appellant raises no question as to the sufficiency of the indictment or the evidence. We, therefore, deem it unnecessary to make any further statement of the facts. We will, however, advert to the testimony whenever necessary to present the Government's position on the rulings of the court complained of in the Specifications of Errors.

The appellant's brief correctly shows the jurisdiction of the district court and of this court.

QUESTIONS PRESENTED

1. "Due Process of Law," as set forth in the Fifth Admendment to the Federal Constitution, was denied defendant in that the trial court erroneously ruled that a Statute of the United States had been replaced by another, when such statute was and still is in force and effect. Whereupon defendant did not have a trial according to the "Law of the Land" or by "Due Process of Law".

2. "Due Process of Law," as set forth in the Fifth Amendment to the Federal Constitution, was denied defendant in that the language of Title 18, U. S. Code, Section 287 as interpreted by the trial judge required a lesser degree of proof of felonious or fraudulent intent than if the defendant was to be tried according to the language of Title 18, U. S. Code, Section 1001, which, as interpreted by the trial judge, required proof of a specific fraudulent or felonious intent.

3. Where fraudulent intent or guilty knowledge is in issue, regulations controlling the form and preparation of vouchers are relevant and material, and the exclusion of material evidence offered on behalf of the accused in a criminal case is reversible error.

In the instant case, the exclusion of the Rules and Regulations from evidence made the issue of the falsity of the claim or of the knowledge or intention of the defendant impossible to determine and denied to defendant the "Due Process of the Law".

4. Where fraudulent intent is in issue, the intent may be inferred from the circumstances of the case and it is competent to give evidence of any circumstances tending to show that the act was done with a different intent from that necessarily involved in the

charge. (*People v. Martell, 21 Cal. App. 573, 132 Pac. 600.*)

5. Where defendant was not permitted to cross-examine a hostile witness as to matters which had a direct bearing upon the interest, bias and motives of such witness, then such curtailment and limitation of cross-examination was in violation of

Amendment VI to the United States Constitution, with reference to its pertinent provisions to the instant case, which states:

> "In all criminal prosecutions, the accused shall enjoy the right . . .; to be confronted with the witnesses against him . . ."

6. Comments by the trial judge made during the course of trial evidenced prejudice on the part of the court so as to deprive defendant of a fair trial, and that the said comments amounted to a determination of the merits and on the issue which the jury was to determine, thereby abridging the right to a fair trial guaranteed by the Sixth Amendment to the United States Constitution.

7. The action of the trial court in recalling the jury from its deliberation in the jury room and stating that the court heard everything the jury said; and that the jury was paying little attention to the court's instructions; and that unless a verdict was reached within a specified time (20 minutes), that the judge would not be available unless he could get an elevator; and that the statement of the trial judge,

> ". . . If you haven't arrived at a verdict by that time, comfortable quarters will be provided for you in a hotel."

was an undue interference with the privacy and deliberations of the Jury, and resulted in coercion and

intimidation, all of which is a denial to a trial by

". . . an impartial jury"

and which right is guaranteed by the Sixth Amendment to the United States Constitution.

ARGUMENT

In our argument, we will discuss appellant's specifications of error in the order in which they appear in his brief:

SPECIFICATION OF ERROR NO. 1

(Appellant's Brief, page 23)

In this specification, the appellant complains of the court's ruling in denying defendant's Motion to Dismiss, on the ground that the trial court stated in its ruling that Section 1001 of Title 18 had been replaced and the indictment was brought under the new section, No. 287, Title 18, when, as a matter of fact, both sections were in full force and effect.

In appellant's argument in support of this specification, he complains that he was not tried according to the "Law of the Land" and relies upon the "Due Process of Law" provision of Amendment V of the Constitution of the United States.

We do not deny that every defendant is entitled to the protection of the "Due Process of Law" provision of our Constitution. We have no quarrel with the authoritites cited by appellant in his brief in support of that principle.

In the complaint before the Commissioner, the appellant was charged under Section 1001, Title 18 U.S.C. In fact, the caption of the Commissioner's complaint referred to Title *19*. (T. R. 2).

In the indictment returned by the Grand Jury, violation of Section 287, Title 18, U.S.C. was charged. (T. R. 11).

The whole theory of appellant's position is contained in the last paragraph of page 25 of his brief:

> "It is apparent from the discussion by the learned Judge that the reason for denying defendant's Motion was based upon his ruling that Title 18, U. S. Code, Section 1001 was no longer law."

It is apparent from this statement that appellant's premise is false and his conclusion a *non sequitur.*

The question the court had before it was whether the indictment stated an offense under Section 287, Title 18, U.S.C. or any other section of the Federal Statutes. Justice Holmes said many years ago:

> "It is wholly immaterial what Statute was in the mind of the District Attorney when he directed the indictment if the charges made are embraced by some Statute in force."

Williams v. U.S., 168 U.S. 382-389.
Rogers v. U.S., 180 Fed. 54-59.

SPECIFICATION OF ERROR NO. 2

(Appellant's Brief, page 27)

This specification is merely a repetition and duplication of Specification No. 1. With the exception of a few comments, we rely on our answer to Specification No. 1.

The only additional argument offered by appellant in support of Specification No. 2 is based upon the wrong premise that the appellant is being prosecuted under Section 1001, Title 18 U.S.C., rather than Section 287, Title 18 U.S.C. Both of these sections are taken from the old Section 80 of Title 18, U.S.C.

Whether the court in its remarks (T. R. 36) meant that Section 1001, referred to in the Commissioner's complaint, was replaced in the indictment by Section 287; or whether the court was under the erroneous impression that Section 1001 had been replaced in the Statutes by Section 287 is immaterial. The fact still remains that the appellant was prosecuted under Section 287. The Court, in its instructions, was governed by Section 287, and there were no exceptions taken to the instructions. (T. R. 190).

SPECIFICATION OF ERROR, NOS. 3 and 4

(Appellant's Brief, page 33)

Specification No. 3 complains of the court's ruling, excluding from the evidence, Regulations and Procedure ‡10539 and Manual M 7-5, on the ground that they "are the best evidence concerning what the regulations are".

Specification No. 4 complains of the court's ruling, excluding the same items on the ground that they "would have a direct bearing upon the lack of fraudulent intent of the defendant".

The fact that the documents would be the best evidence of what they contained would not, in itself, make them admissible. They would still have to be material. They were not marked for identification and were not made a part of the record in this court. There is, therefore, no way in which this court can determine their materiality. The only knowledge which we have of the contents of the documents under consideration is gathered from the testimony of the witness who produced them in court, the questions and answers concerning which are, in part, as follows:

"Q. (By Mr. Wheeler): Do you have a copy of Regulation 10539, Rules and Procedure Manual, M7-5 with you, Mr. Robbeloth?"

"A. Yes. * * *"

"Q. Well, with the permission of the court, to clarify the matter, is there a provision therein to bill at irregular intervals?"

"A. There are provisions to bill at irregular intervals for supplies which are furnished."

"The Court: May I ask a question? Is there a provision for the billing of tools before they are actually furnished?"

"The Witness: No, sir."

"Q. (By Mr. Wheeler): Is there a provision therein that tools and books on order or which have not been issued, Mr. Robbeloth, are considered to be furnished?"

"A. Not to my knowledge." (T. R. 48, 49)

From the foregoing, it clearly appears that the appellant would receive neither aid nor comfort from the regulations.

If the documents contained any provisions that would tend to justify appellant in filing the false vouchers, that part should have been called to the attention of the court and read into the record, and an offer of proof made, so that the trial court and this court could determine its admissibility; or if the documents contain matter of which the court could take judicial notice, then an instruction based upon them should have been requested.

To permit litigants to offer voluminous documents in evidence without pointing out their materiality would seriously interfere with the orderly and expeditious trial of cases. The court should not be required to read such documents.

SPECIFICATION OF ERROR NO. 5

(Appellant's Brief, page 38)

In specification No. 5, appellant complains of the court's refusal to admit in evidence other vouchers which had been submitted to the Veterans Administration by the company and which were signed by officers of the company other than the appellant.

It is the contention of the appellant that those vouchers signed by other officers were handled just the same as the vouchers which the indictment charges the appellant with filing. To be more specific: that other officers of the company signed and filed vouchers for supplies which had not been furnished, thereby establishing a course of action that was followed by appellant. (T. R. 149, 150).

Appellant cites no authorities to support his theory that such action on the part of other officers would relieve the appellant of all criminal liability.

As a matter of record, appellant was permitted to introduce testimony concerning other vouchers. (T. R. 153).

At the trial of the case, the appellant testified that he signed the vouchers after checking the receipts signed by the students, which receipts showed that all of the tools had been received by them. (T. R. 151).

The position taken by the appellant that, according to his knowledge, based on the receipts, the tools had been delivered, is inconsistent with the theory under Specification of Error No. 5. The theory there is that he was following a course of action theretofore adopted by the company and approved by the Veterans Administration in vouchering for tools before they were delivered.

The Jury heard all of the evidence and found the defendant guilty. They evidently did not believe his testimony about examining the receipts, but did believe the testimony of the witness, Streicher, whose testimony was to the effect that the false vouchers were prepared and filed on the advice of and with the knowledge of appellant. (T. R. 102). (T. R. 107, 108).

SPECIFICATION OF ERROR NO. 6

(Appellant's Brief, page 42)

In this specification, appellant complains of the ruling of the court in sustaining the Government's objection to questions asked of Government's witness, Streicher, concerning the internal affairs of the company.

In appellant's brief (page 43), it is stated that the testimony of the trainees revealed that it was the witness, Fred W. Streicher, who delivered the books and tools and obtained their signatures on receipts prior to delivery of the tools.

Appellant fails to call attention to that part of the record where Streicher testified that he did this on instructions from appellant.

> "The Court: Do you know whether they signed a receipt in full?"
>
> "The Witness: I was told to get the receipts signed that way."
>
> "The Court: By whom?"
>
> "The Witness: By Mr. Smith. In other words, I was working under Mr. Smith's direction."
>
> (T. R. 107, 108)

When an attempt was made to go into transactions and relations between witness, Streicher, and the com-

pany, the court sustained an objection and made the following statement:

> "The Court: Objection sustained. Counsel, let me say this. If you desire to show that this witness had any animosity toward the defendant you may bring that out, but the affairs of the corporation are not the problem of this court or this jury." (T. R. 105)

We believe that to be a correct statement of the law of evidence. Appellant was permitted to cross-examine the witness in reference to his connections with the company and to all transactions that had any bearing on the charge against appellant. (T. R. 108-112, incl.)

Appellant's theory of the importance and materiality of the excluded testimony is shown by the statement of counsel made at the time:

> "Mr. Wheeler: I think, may it please the court, it might apply to the credibility of this particular witness, showing that as treasurer of the corporation he had sole control of the financial affairs." (T. R. 105)

In the lengthy cross-examination of witness Streicher, appellant brought out the fact that the witness was an officer of the company, (T. R. 110), but never remotely approached developing any facts that would tend to show a prejudice or bias on the part of the witness.

SPECIFICATION OF ERROR NO. 7

(Appellant's Brief, page 46)

This specification is directed at remarks made by the court during the trial of the case. These remarks were made by the court in making the rulings which are the basis for specifications numbered 1 to 6, inclusive. There being no error in the rulings, we are unable

to discover any prejudice or error in the remarks of the court; and the appellant has failed to point out in what manner the remarks referred to could have prejudiced the appellant.

In the case cited by appellant in support of his position, *Thomas v. District of Columbia, 90 F (2d) 424,* the facts are easily distinguishable from the present case. In that case, the court referred to the defendants as "communists" and refused to hear witness or argument. In the present case, the court very carefully instructed the jury to disregard any of its remarks which might seem to express its opinion. (T. R. 182, 183).

Goldstein v. U.S., 63 Fed. (2d), 609, 614

We believe the last cited case completely answers the appellant's argument in regard to this specification. The decisions on this point are too numerous to cite. We call the court's attention to the following two cases which we believe are sufficient.

Ford v. U.S., 10 Fed. (2d), 339, 347.

Curtis v. U.S., 67 Fed. (2d), 943, 946.

In the latter case, the court used the same expression as was used in the present case, "we are seeking the truth here".

SPECIFICATION OF ERROR NO. 8

(Appellant's Brief, page 51)

This specification is directed at the action of the court in recalling the jury for the purpose of admonishing them after they had been deliberating approximately 50 minutes. The remarks of the court are set out in full in the record (T. R. 191) and in appellant's brief at page 51.

It was proper for the court to inform the jury that their remarks were so loud they could be heard in other parts of the building. It was also proper to inform them that it would be available to receive a verdict up to a certain time and if they did not reach a verdict by that time, comfortable quarters would be provided for them in a hotel.

Appellant's brief leaves the impression that the court told the jury unless they reached a verdict in 20 minutes, quarters would be provided for them (appellant's brief, page 52). In fact, the court told the jury that if they did not reach a verdict by 9:00 o'clock, quarters would be provided for them. These instructions were given to the jury at approximately 5:35 p.m. (T. R. 192).

The case cited by appellant, *Bowman v. State, 207 Ind. 358, 192 N.E. 755, 96 A.L.R. 522,* does not in any manner support appellant. In the first place, it was a State case. The misconduct charge was on the part of bailiff and the Supreme Court of that State held it was not sufficient to justify a reversal.

In addition to the authorities cited in our argument under Specification of Error No. 7, we also wish to call the court's attention to the following cases which we submit should be read in connection with Specifications Nos. 7 and 8:

U.S. v. Ryan, 23 Fed. Sup. 513

Tuckerman v. U.S., 291 Fed. 958, 965, 966

Endelman v. U.S., 86 Fed. 456, 462 (9th Cir.)

Simmons v. U.S., 142 U.S. 148-155

The *Ryan* case (supra) was a district court opinion. In that case, the court told the jury that if it did not reach a verdict in two hours, it would be discharged.

The case of *Simmons v. U.S.* (supra) has been cited with approval in a recent decision of the Supreme Court. *Bute v. Illinois, 333 U.S. 640-650 (Footnote).* The *Endelman* case cited above is a 9th Circuit decision and I have been unable to find any case in which this court has departed from the principle therein enunciated.

Finally, the remarks of the court complained of in Specifications Nos. 7 and 8 in no way expressed or indicated any opinion of the court as to the guilt or innocence of the appellant, no exceptions were taken to any of the remarks, and no requests were made for any instructions to offset or overcome the effects of the remarks complained of, and no exceptions were taken to the instructions as a whole or any part thereof.

CONCLUSION

We, therefore, respectfully submit that the appellant was afforded a fair and impartial trial; that, under the evidence which was practically undisputed, there could be no doubt of appellant's guilt; no errors were committed by the court in the admission or rejection of evidence; the case was submitted to the jury under proper instructions; and the judgment should be affirmed.

Respectfully submitted,

FRANK E. FLYNN,
United States Attorney
for the District of Arizona

No. 12,573

IN THE

United States Court of Appeals

For the Ninth Circuit

G. CLIFFORD SMITH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

H. C. WHEELER,
111 West Alameda, Tucson, Arizona,
IRVING KIPNIS,
52 West Alameda, Tucson, Arizona,
JACKSON E. NICHOLS,
1224 Hearst Building, San Francisco 3, California,
Attorneys for Appellant and Petitioner.

No. 12,573

IN THE

United States Court of Appeals

For the Ninth Circuit

G. CLIFFORD SMITH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Appellant respectfully prays that this cause be reheard and reconsidered, and prays for a reconsideration of the opinion filed herein February 26, 1951, by reason of all the records and files herein and because of the following points in which the appellant believes that the Court fell into substantial and serious error on the legal and factual issues involved and presented by the appeal in this cause:

I.

Appellant stressed one point only on his appeal, the issue raised by Item 8 of the Specifications of Error. This was the basis of Judge Denman's dissenting opinion filed herein and this is the only point of error to which this Petition is directed. It concerns the conduct and language of the Court in recalling the jury from their deliberations and admonishing them in language hereinafter set forth.

In sustaining the conviction, the majority opinion of this Court answers appellant on this point by holding (1) that prior instructions given by the judge covered any possible misconception or error that might have been made by him at this later time, and (2) that the jury was able thereafter to arrive at a quick verdict because they disregarded the irrelevancies with which they had been concerned. It is held that the relevant matters being simple and supported by overwhelming evidence the jury was able to agree after a short period of deliberation.

It is the position of this appellant that a closer consideration and review of the record will not sustain either of these holdings.

Without intending to be repetitious, but because it is the crux of the whole matter, we respectfully direct the Court's attention again to the language of the Court, taken from pages 191 and 192 of the Transcript:

> "The Court: Ladies and Gentlemen, you have been out now for about an hour and it is getting

late. I understand you have not reached a verdict. I want to advise you that if there isn't a verdict by 5:20 o'clock I shall be available after dinner and up until 9:00 o'clock, *providing the elevators here are running.* If they make provisions for elevator service I will be available until 9:00 o'clock, otherwise I shall receive your verdict in the morning.

It might interest you to know that your conversations have been so loud in the jury room that you have been heard all over this portion of the building.

It is very apparent the jury is paying very little attention to the court's instructions. You are arguing as to whether I am a tough judge or not and whether the entire outfit should be in court. Those are things I told you to stay away from. However those have been the subjects of your arguments.

I thought you might be interested to know that. We have heard everything you have said, particularly when your voices were raised. I am making these comments but *you don't have to pay any attention to my instructions unless you want to* and you are privileged to discuss me, but I don't happen to be the defendant in this case and I am not interested in your verdict except that you arrive at one.

I have instructed the bailiff to provide you with dinner if you haven't arrived at a verdict by 5:20. If you arrive at a verdict after that and I can get in the building I will be here to receive it, but I am not going to put myself in the same position that Judge Speakman is in by climbing

stairs at night. If I can get an elevator I will receive your verdict up to 9:00 o'clock. If you haven't arrived at a verdict by that time comfortable quarters will be provided for you in a hotel.

I am making this statement so you will understand why I can't stay here indefinitely and why provisions will be made for you.

With that you are instructed to retire to your jury room."

[Italics ours.]

We believe it is very important to note that the judge uses the word "instructions" not once but twice. In the third paragraph he says:

"It is very apparent the jury is paying very little attention to the court's instructions."

At this point there can be no mistake but that he is referring to his previous "Instructions" given before the jury retired.

Then in the very next paragraph he says:

"I am making these comments but you don't have to pay any attention to my instructions unless you want to * * *"

Coming as this does directly after the previous reference to "Instructions" we feel the jury could only draw one possible conclusion as to what "Instructions" the judge was talking about. The word "Instructions" had not been used anywhere else except on page 182 of the Transcript, where the judge

said: "* * * it is your duty to follow my instructions as to the law."

In all fairness, how can it be said that any other and prior instructions cured this error? Nor is there any subsequent comment by the judge to cure this last all inclusive "instruction."

II.

Relative to the Second Point in the Court's opinion, we do not believe that the determination of the guilt or innocence of appellant was a simple matter, supported by overwhelming evidence. On the contrary, we believe that there was a clear conflict of testimony to be considered by the jury.

We respectfully call the Court's attention to the nature of the offense here involved. The judge instructed the jury that they must find (1) that a false claim was filed and (2) that the defendant knew it was false. (Transcript p. 185.) He further instructed, on page 187 of the transcript, as follows:

> "The defendant has offered himself as a witness and has testified in the case. Having done so you are to estimate and determine his credibility in the same way as you would consider the testimony of other witnesses."

As the case stood at its conclusion, the only real issue for the jury appeared to be whether the defendant knew the claim was false at the time it was presented.

This issue was largely a subjective matter on which the jury would be influenced to a great degree by the testimony of the defendant himself.

At three separate places in the transcript defendant categorically denies that he had any knowledge that the claim was false when presented.

For the Court's consideration, we respectfully quote the transcript (pages 158, 159 and 160):

> The Court: Well, you knew whether or not the tools had been delivered to the institution?
>
> The Witness: No, sir, I did not.
>
> * * * * * *
>
> The Court: Then as I understand your testimony you didn't know of your own knowledge whether these receipts reflected the truth or not?
>
> The Witness: Of my own knowledge no, sir.
>
> The Court: You relied upon these statements?
>
> The Witness: That is correct, sir, I did.
>
> The Court: And that is your contention here today?
>
> The Witness: That is right, sir. I couldn't handle every phase of it myself.
>
> The Court: The only thing I am asking you if that is your position?
>
> The Witness: That is correct, sir.
>
> * * * * * *
>
> Q. Did you know whether they had not or had been delivered to them?
>
> A. To my knowledge they had been delivered, Mr. Peterson."

It is appellant's position that there was no additional evidence to prove conclusively that appellant knew the claim was false.

This vital element of proof, therefore, was clearly in dispute and until the judge informed the jury they could disregard the instructions as herein quoted it is our contention that the jury was unable to agree. This is even further demonstrated by the fact the jury was overheard to discuss "whether the entire outfit should be in court" (Trans. p. 191). A review of the record shows that other officers of the school actually handled the supplies and were in a far better position to have knowledge of the truth or falsity of the claim than this appellant.

III.

Our concluding argument would direct the Court's attention to the time limit feature of the judge's final admonition. At 5:05 he gave the jury until 5:20, a period of fifteen minutes, in which to reach a verdict or be locked up for the night. Yet the jury did not actually return with a verdict until 5:35.

Is it not being realistic to believe that there were a few jurors who were not convinced of the guilt of the defendant beyond a reasonable doubt even at the 5:20 deadline, but who by 5:35 were, in the words of the minority opinion of Judge Denman, persuaded "not to bother about the burden of proof" but "settle our quarrels and go home."

CONCLUSION.

We sincerely believe that a careful reconsideration of the record will convince this Court that the jury concluded but one thing from the Judge's admonitions when he called them out of their deliberations, to wit, that they could disregard his prior instructions if they so desired.

Under these circumstances, and with a dead line of fifteen minutes in which to decide, they still took thirty minutes to bring in what in our opinion was a compromise—a verdict of guilty with a recommendation of leniency.

We respectfully submit that this appellant was deprived of a fair trial by an impartial jury as guaranteed by the Constitution of the United States.

Dated, San Francisco, California,
March 26, 1951.

Respectfully submitted,
H. C. Wheeler,
Irving Kipnis,
Jackson E. Nichols,
Attorneys for Appellant and Petitioner.

Certificate of Counsel

I hereby certify that in my judgment the foregoing petition for rehearing is well founded, and that it is not interposed for delay.

Dated, San Francisco, California,
March 26, 1951.

Respectfully submitted,
Jackson E. Nichols,
Of Counsel for Appellant and Petitioner.

No. 12574

United States
Court of Appeals
for the Ninth Circuit.

THE INDEMNITY MARINE ASSURANCE COMPANY, LIMITED,

Appellant,

vs.

FULGENCIA D. CADIENTE,

Appellee.

Apostles on Appeal

Appeal from the United States District Court, District of Hawaii.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12574

United States
Court of Appeals
for the Ninth Circuit.

THE INDEMNITY MARINE ASSURANCE COMPANY, LIMITED,

Appellant,

vs.

FULGENCIA D. CADIENTE,

Appellee.

Apostles on Appeal

Appeal from the United States District Court, District of Hawaii.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

INDEX PAGE

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

HYMAN M. GREENSTEIN, ESQ.,

501 Merchandise Mart Building,
Honolulu, T. H.

For the Libelant, Fulgencia D. Cadiente.

ROBERTSON, CASTLE & ANTHONY,

THOMAS M. WADDOUPS, ESQ.,

ROBERT E. BROWN, ESQ.,

312 Castle & Cooke Building,
Honolulu, T. H.

For the Respondent, The Indemnity Marine Assurance Company, Limited.

In the United States District Court for the Territory of Hawaii

Admiralty No. 417
Suit on Maritime Insurance Policy

FULGENCIA D. CADIENTE,

Libelant,

vs.

THE INDEMNITY MARINE ASSURANCE COMPANY LIMITED,

Respondent.

LIBEL IN PERSONAM

To The Honorable, the Judges of the United States District Court for the Territory of Hawaii:

Comes now Fulgencia D. Cadiente, libelant above named, by Hyman M. Greenstein, her proctor, and for libel against The Indemnity Marine Assurance Company, Limited, respondent above named, respectfully represents as follows:

1. That libelant at all times hereinafter mentioned was and now is a citizen of the United States of America, residing in Honolulu, City and County of Honolulu, Territory of Hawaii.

2. That libelant is informed and believes and upon such information and belief states the fact to be that respondent is a foreign corporation, having its principal place of business in England, and doing business in the Territory of Hawaii through

The Bonding and Insurance Agency, Ltd., an Hawaiian corporation, as its duly authorized agent.

3. That on or about the 8th day of December, 1948, by a marine insurance policy, number 11 S.F.H. 10562, in consideration of an agreed premium, which has been duly paid by the libelant, said respondent insured the libelant in the sum of $10,500.00, covering total loss or constructive total loss of a certain oil screw vessel, Miss Philippine, owned by said assured libelant; a copy of said marine insurance policy is made a part of this libel and marked Exhibit "A."

4. That on or about the 6th day of June, 1949, said vessel Miss Philippine, did become stranded or run aground on the beach at Kaupo, Hana, Maui, Territory of Hawaii, and the bottom thereof did become torn loose, so that said vessel did become a constructive total loss within the meaning and coverage of said marine insurance policy.

5. That libelant has duly complied with and duly performed all the conditions of the marine policy issued as aforesaid, on her part to be performed, and duly advised the duly authorized agents of respondent insurance company of said loss.

6. That libelant is still the owner of said insurance policy, and is entitled to receive the loss payable thereunder.

7. That no part of said $10,500 has been paid although demanded by libelant, and by reason of

the premises there is now due and owing from respondent to libelant the said sum of $10,500.00, with interest thereon from June 6, 1949.

8. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays that citation or monition in due form of law according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the respondent herein, citing it to appear and answer the premises, and that a decree may be entered herein in favor of libelant against the respondent for the amount claimed, together with interest thereon, and proctor's fees, and costs and disbursements herein, and that the court may grant to libelant such other and further relief as the justice of the cause may require.

Dated at Honolulu, T. H., this 6th day of July, 1949.

/s/ HYMAN M. GREENSTEIN,
Proctor for Libelant.

Territory of Hawaii,
City and County of Honolulu—ss.

Fulgencia D. Cadiente, being first duly sworn on oath deposes and says: That she is the libelant above named, that she has read the foregoing Libel, knows the contents thereof and that the same is true of her own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters she believes it to be true.

/s/ FULGENCIA D. CADIENTE.

Subscribed and sworn to before me this 6th day of July, 1949.

[Seal] /s/ RON I. PAVAO,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires January 22, 1951.

HULL POLICY

EXHIBIT "A"

No. 11 S.F.H. 10562

6

The Indemnity Marine Assurance Company Limited

ESTABLISHED 1824

HEAD OFFICES: LLOYD'S BUILDING, LONDON E.C.3, ENG.

WM. H. McGEE & CO., INC.
UNITED STATES MANAGERS
111 JOHN STREET, NEW YORK 7, N. Y.
PACIFIC COAST DEPARTMENT
300 CALIFORNIA STREET, SAN FRANCISCO 4, CAL.

UNT $ 10,500.00 (as hereinafter provided) RATE 3% PREMIUM $ 315.00

In consideration of the stipulations, terms and conditions herein named

- - - - - - - -THREE HUNDRED FIFTEEN AND NO/100 - - - -Dollars, Premium

nsure FULGENCIA D. CADIENTE

Address is General Delivery, Ewa, Oahu, T. H.

he 8th day of December 1948 at noon, to the 8th day of December 1949 at noon,

rd Time at place of issuance, *unless sooner terminated as hereinafter provided.*

, if any, payable to BANK OF HAWAII with balance, if any, payable to JOICHI TAMIMURA dba KEWALO SHIPYARDS

Kewalo Shipyards
29, 1949

In the event of non-payment of premium thirty days after attachment this Policy may be cancelled by the rs upon five days' written notice being given the Assured.

This Policy is made and accepted subject to the foregoing stipulations, terms and conditions, and to the stipulations, and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together ich other provisions, agreements, or conditions as may be endorsed hereon or added hereto on page three of this Policy where; and no officer, agent, or other representative of this Company shall have power to waive or be deemed to have any provisions, terms, conditions or stipulations of this Policy unless such waiver, if any, shall be written upon or ed hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the d unless so written or attached.

Provisions required by law to be stated in this Policy:—This Policy is in a stock corporation.

IN WITNESS WHEREOF, this Company has executed and attested these presents; but this Policy shall not be valid countersigned by Wm. H. McGee & Co., Inc., or a duly authorized agent of this Company.

WM. H. McGEE & CO., Inc., United States Managers

H. Jackson
PRESIDENT

and countersigned at Honolulu, T. H. this 8th day of December 1948

THE BONDING AND INSURANCE AGENCY, LTD.

Agent

One

CONDITIONS REFERRED TO ON THE FACE OF THIS POLICY

TOUCHING the adventures and perils which said Company is contented to bear and take upon itself, they are of the seas, fires, assailing thieves, jettisons, criminal barratry of the master and mariners and all other like perils and disasters that have or shall come to the property hereby insured or any part thereof, and in case of loss or misfortune, it shall be lawful and necessary to and for the Assured, his or their factors, servants and assigns, to sue, labor and travel for, in and about the defense, safeguard and recovery of the property hereby insured or any part thereof, without prejudice to this insurance; nor shall the acts of the Assured or Insurers, in recovering, saving, and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment; to the charges whereof the said Company will contribute in proportion as the sum thereby insured bears to the whole sum at risk.

Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), but this warranty shall not exclude collision, contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather or fire unless caused directly (and independently of the nature of the voyage or service which the vessel concerned or, in the case of a collision, any other vessel involved therein, is performing) by a hostile act by or against a belligerent power; and for the purpose of this warranty "power" includes any authority maintaining naval, military or air forces in association with a power.

Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or piracy.

This insurance is warranted free of loss or damage caused by or resulting from strikes, lockouts, labor disturbances, riots, civil commotions or the acts of any person or persons taking part in any such occurrence or disorder.

No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovering and repairing the Vessel shall exceed the insured value.

In ascertaining whether the vessel is a Constructive Total Loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account.

In the event of Total or Constructive Total Loss, no claim to be made by the Underwriters for freight, whether notice of abandonment has been given or not.

In no case shall Underwriters be liable for unrepaired damage in addition to a subsequent Total Loss sustained during the term covered by this Policy.

If there be an Agent or Surveyor of the Insurers located at or near any place where repairs are made, or proofs of loss or average taken, said Agent or Surveyor must be represented on the surveys, if any be held, and all bills for repairs, or proofs of loss or average, must be certified to by him, or they will not be allowed by the said Assurers.

Warranted that no action will be taken by the Assured or his assignees to enforce payment of any claim under this Policy except before the tribunals of the United States of America or England.

Notwithstanding any language, whether written, typewritten or printed, contained in this Policy to the effect that it is for the benefit of whom it may concern, or any similar language, it is agreed that if the Assured's interest in the vessel hereby insured shall change during the currency of this Policy, then this Policy shall become null and void from the date of such change of interest, unless such change shall have been assented to in writing by these Insurers.

It is a condition of this insurance that any broker, person, firm or corporation who shall procure this insurance to be taken by these Insurers shall be deemed to be exclusively the Agent of the Assured in any and all transactions and representations relating to this Insurance, and that any notice which these Insurers may give to such broker shall be deemed to have been given to the Assured, who hereby appoints said broker, his, its or their agent for that purpose and the other purposes aforesaid.

Form 1089C-250-2-47-78771-Printed in U. S. A.

AMERICAN HULLS (Pacific)

T. and C. T. L. only

Touching the Adventures and Perils which we, the said Assurers, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counter-Mart, Surprisals, Takings at Sea, Arrests, Restraints and detainments of all Kings, Princes and Peoples, of what nation, condition or quality soever, Barratry of the Master and Mariners and of all other like Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Vessels, &c., or any part thereof. And in case of any Loss or Misfortune, it shall be lawful for the Assured, their Factors, Servants, and Assigns, to sue, labour and travel for, in, and about the Defense, Safeguard and Recovery of the said Vessel, &c., or any part thereof, without prejudice to this Insurance. And it is expressly declared and agreed that no act of the Assurers or Assured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment.

Warranted free of all average (whether particular or general) salvage charges and particular charges, this insurance being against the risk of Total and/or Constructive Total Loss of vessel only arising from perils insured against.

In port and at sea, in docks and graving docks, and on ways, gridirons and pontoons, at all times, in all places, and on all occasions, services and trades whatsoever and wheresoever, under steam or sail, with leave to sail with or without pilots, to tow and assist vessels or craft in all situations, and to be towed, and to go on trial trips.

Held covered in case of any breach of warranty as to cargo, trade, locality or date of sailing, provided notice be given and any additional premium required be agreed immediately after receipt of advices.

Should the vessel at the expiration of this Policy be at sea, or in distress, or at a port of refuge or of call, she shall, provided previous notice be given to the Underwriters, be held covered at a pro rata monthly premium, to her port of destination.

In ascertaining whether the Vessel is a constructive total loss, the insured value shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.

Should the vessel be sold or transferred to new management, then, unless the Underwriters agree in writing to such sale or transfer, this Policy shall thereupon become cancelled from date of sale or transfer, unless the Vessel has cargo on board and has already sailed from her loading port or is at sea in ballast, in either of which cases such cancellation shall be suspended until arrival at final port of discharge if with cargo, or at port of destination if in ballast. A pro rata daily return of net premium shall be made. The foregoing provisions with respect to cancellation in the event of sale or change of management shall apply even in the case of insurance "for account of whom it may concern".

This insurance also specially to cover total or constructive total loss of vessel directly caused by the following:—

Accidents in loading, discharging or handling cargo, or in bunkering or in taking in fuel.
Explosions on shipboard or elsewhere.
Bursting of boilers, breakage of shafts or any latent defect in the machinery or hull (excluding, however, the cost and expense of repairing or renewing the defective part).
Negligence of Master, Mariners, Engineers or Pilots.

provided such loss or damage has not resulted from want of due diligence by the Owners of the Vessel, or any of them, or by the Managers.

Masters, Mates, Engineers, Pilots or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the Vessel.

In the event of total or constructive total loss, no claim to be made by the Underwriters for freight, whether notice of abandonment has been given or not.

At the expiration of this Policy to return N11 per cent. net for every thirty consecutive days the Vessel may be laid up in port out of commission, and to return 20% per cent. net for every thirty days of unexpired time if it be mutually agreed to cancel this Policy, but no returns whatsoever to be paid in case of loss of the Vessel.

In the event of the Vessel being laid up in port for a period of 30 consecutive days a part only of which attaches to this Policy is hereby agreed that the laying up period in which either the commencing or ending date of this Policy falls shall be deemed to run from the first day on which the Vessel is laid up and that on this basis Underwriters shall pay such proportion of the return due in respect of a full period of 30 days as the number of days attaching hereto bear to thirty.

Notwithstanding the foregoing this Policy is:

(a) Warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), but this warranty shall not exclude collision, contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather or fire unless caused directly (and independently of the nature of the voyage or service which the vessel concerned or, in the case of a collision, any other vessel involved therein, is performing by a hostile act by or against a belligerent power; and for the purpose of this warranty "power" includes any authority maintaining naval, military or air forces in association with a power.
Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or piracy.

If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force.

(b) Warranted to be subject to English law and usage as to liability for and settlement of any and all claims.

Board of Marine Underwriters of San Francisco, Incorporated Printed in U.S.A.
Form 6 1M 1-48 BPC

Wm. H. McGee & Co., Inc.
General Agents
111 John Street
New York 7, N. Y.

December 8th, 1948.

ADDENDUM

For attachment to Policy No. 11 SFH 10562
of the Indemnity Marine Assurance Company
issued to Fulgencia D. Cadiente

Notwithstanding anything herein contained to the contrary, it is mutually understood and agreed that in ascertaining whether the vessel is a Constructive Total Loss, $21,000.00, shall be taken as the repaired value and nothing in respect to the damaged or breakup value of the vessel or wreck shall be taken into account. Should the assured by reason of insured perils become entitled to abandon the vessel and to claim a Constructive Total Loss but refrain from doing so and the vessel be not repaired or if she be sold unrepaired, liability hereunder shall be determined as if notice of abandonment had been given and a Constructive Total Loss claimed.

All Other Terms and Conditions Remain Unchanged.

[Endorsed]: Filed July 6, 1949.

[Title of District Court and Cause.]

MONITION

The President of the United States of America

To the Marshal of the United States of America for the Territory of Hawaii—Greetings:

Whereas, a Libel has been filed in the District Court of the United States for the Territory of Hawaii, on the 6th day of July, 1949, by Fulgencia D. Cadiente, Libelant, against The Indemnity Marine Assurance Company, Limited, Respondent, in a certain action for loss under an insurance policy, civil and maritime, to recover the sum of $10,500.00, (as by said Libel, reference being hereby made thereto, will more fully appear) therein alleged to be due the Libelant and praying that a citation or monition may issue against the said respondent pursuant to the rules and practices of this Court.

Now, Therefore, we do hereby empower and strictly charge and command you, the Marshal, that you cite and admonish the said Respondent if it shall be found in your District, that it be and appear and answer before the said United States District Court 20 days after service hereof on the Respondent, then and there to answer the said Libel and to make allegations in that behalf. And have you then and there this writ with your return thereon.

Witness, the Hon. J. Frank McLaughlin, Judge

of said Court, at the City and County of Honolulu, in the Territory of Hawaii, this 6th day of July, A.D. 1949, and of our Independence the one hundred and seventy-fourth.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk.

/s/ HYMAN M. GREENSTEIN,
Proctor.

[Endorsed]: Filed July 6, 1949.

[Title of District Court and Cause.]

ANSWER

Comes now The Indemnity Marine Assurance Company, Limited, respondent above named, by Robertson, Castle & Anthony, its proctors, and answering the libel filed in the above-entitled cause respectfully alleges as follows:

I.

That it neither admits nor denies the allegations of paragraph 1 thereof, but leaves libelant to her proof thereof.

II.

That it admits the allegations of paragraph 2 thereof.

III.

That it admits the issuance of a policy of marine insurance as alleged in paragraph 3 thereof, but denies that said policy contains any mention of the vessel Miss Philippine.

IV.

That it denies the allegations of paragraph 4 thereof.

V.

That it denies the allegations of paragraph 5 thereof.

VI.

That it neither admits nor denies that libelant is the owner of said policy of marine insurance but leaves libelant to her proof thereof, and that it denies that there is any loss payable under said policy.

VII.

That it admits that no part of $10,500 has been paid but denies the other allegations of paragraph 7 thereof.

Wherefore, respondent prays that the libel herein be dismissed and judgment rendered in favor of respondent for its costs, disbursements and proctors' fees herein.

Dated: Honolulu, Hawaii, November 3, 1949.

The Indemnity Marine Assurance Company, Limited, respondent,

By ROBERTSON CASTLE & ANTHONY,
Its Proctors.

By /s/ ROBERT E. BROWN.

Duly verified.

Receipt of Copy Acknowledged.

[Endorsed]: Filed November 3, 1949.

[Title of District Court and Cause.]

FINDINGS AS GLEANED AND CONSTRUED FROM EVIDENCE

Libelant was the owner of an oil screw vessel named "Miss Philippine," an exaggerated type of sampan, built and reigstered at Honolulu, Hawaii, in 1947. The vessel was adapted for and used by the owner, with other vessels, in off-shore fishing. Agents or representatives of the respondent came to libelant's home and solicited the writing of insurance on said vessel, and on December 8, 1948, an insurance policy was written by respondent in favor of libelant-owner to cover for a year, a total or constructive total loss in the payable sum of $10,500. Prior to December, 1948, another insur-

ance agent's company had carried a more comprehensive policy for a year at a higher rate, 8%, but had not notified libelant of its expiry or solicited its renewal. The payee of the present policy, in event of loss, was Bank of Hawaii, a party in interest as mortgagee at the time, and the policy was delivered by respondent directly to the bank. Neither the libelant or Telesforo Cadiente, her husband, agent and business manager, ever saw the policy or the addendum rider clipped thereto, which rider requires "that in ascertaining whether the vessel is a constructive total loss $21,000 shall be taken as the repaired value." It was in no manner explained to either of them in any of its terms and they were given no opportunity to read it, being told only that the policy covered total and constructive total loss in the sum of $10,500. The premium of $315 was paid.

On Monday, June 6, 1949, said vessel was stranded by reason of the displacement and loss of her propeller and rudder and, dragging her anchor, she was driven by the sea onto a boulder-strewn, isolated beach at Kaupo, Island of Maui, Hawaii, so that she lay athwart or transverse to the sea and was being pounded and heavily rocked by a fairly high sea. As soon as her master could obtain a means of communication he notified the U. S. Coast Guard on that island who in turn communicated information of the stranding to the husband and managing agent of the owner at Ewa, Oahu. Apparently, this information was communicated the

same day to the respondent and to King, Limited, a tugboat operator at Honolulu. A Coast Guard craft went to the scene and from the sea looked the situation over and reported to the master that they could do nothing toward an attempt to draw the vessel off the rocky beach as the sea was running too high.

The owner's agent, Telesforo Cadiente, went to Maui the following day by plane and by automobile reached the beach where the vessel was stranded. He and the master of the stranded vessel made what inspection and examination they could from the shore and saw she was rocking heavily between large boulders and that part of her hull was stove and the sea was surging through her. They could not board her as the sea was running high and throwing water over her.

Before leaving Honolulu, Cadiente was approached by Charles P. Hagood, master of King, Limited's, tugboat "Maizie C," who told him he would like to go to Maui and look at the stranded vessel, and asked libelant's agent to pay his passage for that purpose as he believed he could get the vessel off the rocks and bring her to Honolulu. Cadiente paid Hagood's transportation and, after arriving at Maui, Hagood chartered a small airplane and was flown to the site of the vessel and circled over and around it several times at low altitude. Upon landing he told Cadiente that he believed he could get the vessel into the sea and tow her to Honolulu. A tentative oral agreement was made that he proceed.

The following morning, Wednesday, June 8, Cadiente and the vessel's master and crew again visited the vessel. On this occasion they were able to get on board and make a more intimate examination, although she was still being heavily rolled between the boulders and was much more damaged than the day before. A number of her ribs were broken and some carried away on the port side, amidship and aft; her keel was badly battered and damaged with parts carried away; water was surging through the engine room; and she was firmly wedged between boulders, being broken more with each heavy sea that struck her.

Cadiente and the vessel's master came to the conclusion as a result of this inspection that it would be a hopeless and unjustifiable risk to undertake salvage and rebuilding of the vessel and Cadiente decided then and there to abandon her as a total loss, and told the crew to return to Honolulu. He telephoned to Captain Hagood not to come to Maui with his tug, the "Maizie C", to undertake salvage operations and told the Coast Guard office as well that he was abandoning the vessel and to tell Hagood and the Insurance Company. He then returned to Honolulu and again told Hagood not to take the "Maizie C" to Maui, that he had abandoned the boat.

The morning of June 9, he went to get advice as to the feasibility of rebuilding the boat from J. Tanimura, the proprietor of Kewalo Shipyard, who had built the boat in 1947, and after discussing with

Tanimura the position and condition of the vessel and getting the advice of the builder he was confirmed in his judgment and decision of abandoning her as an irredeemable total loss.

That evening at 8:00 p.m. he received a letter dated June 9, signed by Mr. A. H. Matthew, office manager of the agents of respondent, advising him that the sampan "Miss Philippine" was stranded at or near Pauhana, Maui, and that he "proceed with salvaging of this vessel in accordance with conditions of the above policy."

The morning of Friday, June 10, he called on Mr. Matthew at his office and told him that he had talked with the builders and the Coast Guard and had reached a definite decision that it would be an unwarranted risk and useless for him to undertake to salvage and rebuild the boat, and he had abandoned her and had, before leaving Maui on the 8th, asked the Coast Guard to so advise the agents of the insurance company of such surrender.

At Mr. Matthew's request he went the same day to the office of the insurance agents' attorney, Thomas Waddoups. There he was asked if he was abandoning the sampan and he said, "Yes," he had abandoned it. Then Mr. Waddoups told him to get a lawyer and he was told to come back on Monday, the 13th, and bring his wife. He attended the Monday meeting. A number of persons were then present at Mr. Waddoups' office and he learned that the insurance company had two days prior entered into a charter party with King, Limited, to send

the tug "Maizie C" to Maui to undertake salvage operations under control of a Mr. Gallagher, a ship surveyor, as agent for the respondent. The following day libelant's attorney wrote respondent demanding $10,500 for total loss under the policy.

The charter party above mentioned was put in evidence as libelant's Exhibit "B." It provided that an attempt be made to float the sampan and tow her to a Marine Railway at Honolulu, the owners of "Maizie C," an oil screw motorboat, to be paid $15 per hour for hire with three regular crew and $1.00 per hour for three additional crew, also $100 for additional insurance protection, and any and all other expenses incurred by her owner, or agents, which were reasonaby necessary to the undertaking; provided, on express agreement, that if salvage operations were not successful at the time charges amounted to the sum of $1,500, including charges for the tug's return to Honolulu, the salvage operations were to be abandoned and the "Maizie C" was to return forthwith to Honolulu, unless the Charterer or its agent on the spot authorized a continuance of said operations in writing; and if "Miss Philippine" was damaged or lost during the salvage operations the Charterer would be responsible therefor.

Salvage operations under the charter and otherwise were begun at Kaupo, Maui, on Saturday, June 11, under the directions of Mr. Gallagher. The sea had quieted down considerably, although the beach is always exposed to channel currents. Several

large-sized air bags were brought ashore from the "Maizie C," together with a small air compressor for inflating them. The bags were secured under deck and inflated. Mr. Gallagher procured the services of a heavy-duty bulldozing machine and its operator and brought it to the beach. The bulldozer pushed and the "Maizie C" pulled; eventually, the boat was turned with prow toward the sea and was pushed and pulled several hundred feet until she had reached sufficient depth for the "Maizie C" to pull her into deep water. A photograph was exhibited to the Court showing the powerful bulldozer a considerable distance from the shore in what appeared to be a perilous position with spray flying over it, but apparently this picture was not put in as an Exhibit. Upon reaching deep water the vessel capsized, turning completely upside down. This resulted in a serious towing problem for the "Maizie C," a motorboat. Towing was begun, however, along the lee side of Maui and by nightfall of June 13 she had made, at a rate of about four miles per hour, 40 to 45 miles, to a point near Lahaina. From this point forward the tow would have to leave the lee of Maui and encounter rough seas, first in the Pailolo Channel running between Maui and Molokai, and then, if he tried to make Honolulu with his heavy tow, in the wider Kaiwi Channel between Molokai and Oahu. Hagood thought it would be very difficult and problematical of success to cross both channels. By this time the $1,500 limitation fixed by the Charterer had become exhausted; he

radiophoned from his boat to his company telling his position and the situation. His company took the matter up with the respondent and received a statement from it that it had no further instructions beyond the terms of the Charter.

Upon learning this Captain Hagood considered himself in a serious predicament for he knew that if he cut the tow loose he would be liable for creating a derelict on the high seas. He said he was apprehensive that if he attempted to tow the wreck to Honolulu it might break up in the rough channel. He asked further istructions from his owner and was told to try to get the boat into a safe harbor, and tie her up, but to use his discretion. He could have taken her to Moala or other ports nearby on Maui, but he decided to try to make Kaunakakai on Molokai, where a friend of his named Yamamoto had a small boatbuilding business and where the wharf was equipped with two heavy cranes. He arrived there the next day, Tuesday, June 14, and tied the wreck to the wharf.

The same day Mr. Gallagher and C. G. Chipchase, an officer of respondent, flew from Honolulu to Kaunakakai and made arrangements with California Packing Corporation, which operates the wharf, to have the boat slung, lifted and warped to an upright position, and then returned to Honolulu. Before Captain Hagood left Kaunakakai he visited his friend Yamamoto and discussed the situation and, while the full scope of the conversation was not disclosed, the part disclosed strongly

indicated that he told Yamamoto he could have the boat if he moved it away from the wharf to his lot. In any event the vessel was taken to Yamamoto's inland yard at some later date. Captain Hagood testified that he would not have accepted the wreck as a gift, but that Yamamoto thought it had some salvage value to him. Upon lifting and turning the vessel over, further damage was done in crushing her sponsons, a protruding part of the hull, by compression of the slings.

On July 16, King Limited wrote to the attorney for the libelant saying they were in receipt of a letter from the Board of Harbor Commissioners directing them to remove the "Miss Philippine" from alongside the wharf at Kaunakakai and telling the attorney that if his client as well as the insurer claimed no further interest in the vessel it was the intention of King Limited to "cannibalize and destroy" the vessel. Apparently no reply was received from either party.

Opinion and Conclusions

The respondent questions the right of the libelant to abandon the vessel on the beach at Kaupo, Maui, and his refusal to take her over at Kaunakakai, Molokai, but I believe his judgment in abandoning her on the beach was vindicated by every subsequent event, and that there certainly was no duty on libelant to seek her possession after respondent had abandoned her at sea.

When the insurer, thinking its judgment was

best, after notice of libelant's abandonment, took her into its control on June 11 and bulldozed her off the beach and then abandoned her carcass at sea two days later in an upturned position, she was a derelict at the mercy of the sea, save for the acts of King Limited, which then took her in a new charge with right of ownership as salvor and towed her remains to a harbor of its selection where she was tied fast to a wharf. The fact that the insurer's agents came in afterwards and had her righted, keel down, does not dispose of their abandonment of her at sea the day before, for this to my mind was a clear and constructive acceptance of libelant's abandonment and respondent's claim of right of disposition. On June 14, King Limited were dealing with the wreck as their problem and no showing was made that the insurer had the consent of King Limited to touch a hand to her at Kaunakakai.

The evidence of Mr. Gallagher that she might have been repaired for $7,500 was in no manner convincing. The "human probabilities rule" as to the cost of getting her off the beach and her condition thereafter, and the cost of getting her into a marine railway at Honolulu and repairing her to good and staunch seaworthy condition, are not of value in the facts of this case, where "human probabilities" could be so highly colored by guesswork alone. The libelant's manager believed, in effect, that he would be putting good money after bad in experimenting further with such an uncertainty

and this view was confirmed after he discussed the matter with the boat's builder. I am convinced that he would have made the same decision if he had had no insurance policy. The respondent, which had $10,500 at stake as to the question of a total loss, seems to have come to the same conclusion on June 13, that salvage was hopeless; for it was then responsible for the position of the wreck and, in response to request for instructions, gave it to the sea or to King Limited.

My conclusion is that the libelant was justified in abandoning the wreck and gave notice of such decision timely and that he was justified in refusing to have the wreck wished on him at a later date after abandonment at sea by the respondent. There is no question that an insurer may by its conduct make itself liable for a total loss and it is my opinion that the respondent is liable for payment of a constructive total loss.

Judgment will enter accordingly.

Dated at Honolulu, Hawaii, April 19, 1950.

/s/ D. E. METZGER,
United States District Judge.

[Endorsed]: Filed April 19, 1950.

In the United States District Court for the Territory of Hawaii

Admiralty No. 417
Suit on Maritime Insurance Policy

FULGENCIA D. CADIENTE,

Libelant,

vs.

THE INDEMNITY MARINE ASSURANCE COMPANY, LIMITED,

Respondent.

FINAL DECREE

This cause having heretofore duly come on to be heard upon the pleadings and proofs, and having been argued and submitted by the advocates of the respective parties and the court, after due deliberation, having rendered its opinion in writing directing a decree of judgment, and libelant's costs having been taxed at the sum of $56.33, now on motion of the proctor for the libelant, it is

Ordered, that the opinion of this court heretofore filed herein on the 19th day of April, 1950, be and is hereby adopted as the court's findings of fact and conclusions of law; It Is Further Ordered, Adjudged and Decreed, that Fulgencia D. Cadiente, libelant, recover of and from the Indemnity Marine Assurance Company, Limited, respondent, the sum of $10,500.00 together with interest thereon

from the 6th day of June, 1949, together with the sum of $56.33 costs of the libelant as taxed, amounting in all to a judgment of $10,556.33 together with interest on said total sum until paid; and it is further

Ordered that unless this decree be satisfied or appeal taken therefrom within 10 days after service of a copy of this decree upon the respondent, or his proctor, the libelant have execution against the respondent and its stipulators for costs, their goods, chattels and lands forthwith to satisfy this decree.

Dated at Honolulu, T. H., this 25th day of April, 1950.

/s/ D. E. METZGER,
United States District Judge.

Approved as to form with all rights of appeal expressly reserved.

/s/ THOMAS M. WADDOUPS,
Proctor for Respondent.

Receipt of copy acknowledge.

[Endorsed]: Filed April 25, 1950.

[Title of District Court and Cause.]

BILL OF COSTS

Proctor's docket fee (clerk's costs)	$15.90
U. S. Marshal's fee	4.18
Proctor's fee	20.00
Other disbursements:	
Notarial fee	.25
Witness fees	16.00
	$56.33

Dated at Honolulu, T. H., this 21st day of April, 1950.

/s/ HYMAN M. GREENSTEIN,
Proctor for Libelant.

The within bill of costs is hereby consented to, reserving, however, all rights to appeal hereunder.

/s/ THOMAS M. WADDOUPS,
Proctor for Respondent.

Approved and Allowed:

/s/ D. E. METZGER,
United States District Judge.

[Endorsed]: Filed April 25, 1950.

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable, the Above Entitled Court:

Comes now The Indemnity Marine Assurance Company, Limited, respondent in the above-entitled cause, and hereby claims an appeal to the United States Court of Appeals for the Ninth Circuit from the final decree of the above-entitled Court entered herein on the 25th day of April, 1950, and from each and every part of said decree and the findings, and conclusions and decisions of the above-entitled Court herein.

And respondent hereby gives notice of said appeal to Fulgencia D. Cadiente, libelant above named, and further notifies that respondent does not intend to make new pleadings or take new proofs on said appeal.

Dated: Honolulu, Hawaii, May 5, 1950.

THE INDEMNITY MARINE ASSURANCE COMPANY, LIMITED,

By ROBERTSON, CASTLE & ANTHONY,

By /s/ ROBERT E. BROWN,
Its proctors.

Order Allowing Appeal

The within petition for appeal is hereby allowed.

Dated: Honolulu, Hawaii, May 5, 1950.

/s/ D. E. METZGER,
United States District Judge.

[Endorsed]: Filed May 5, 1950.

[Title of District Court and Cause.]

BOND ON APPEAL

Know all men by these presents: That the Indemnity Marine Assurance Company, Limited, respondent above named, as principal, and United States Fidelity and Guaranty Company, a corporation duly authorized to do business in the Territory of Hawaii, as surety, are held and firmly bound unto the libelant above named in the sum of two hundred and fifty dollars ($250.00) for the payment of which well and truly to be made, we bind ourselves and our successors and assigns, jointly and severally, and firmly by these presents.

The condition of this obligation is such that:

Whereas, the above bounden principal has taken its appeal to the United States Court of Appeals for the Ninth Circuit from the final decree entered by the United States District Court for the Dis-

trict of Hawaii in the above-entitled cause on the 25th day of April, 1950,

Now, therefore, if the said principal shall prosecute its appeal with effect and pay all costs if it fails to sustain said appeal, then this obligation shall be void; otherwise the same shall remain in full force and effect.

In witness whereof the said principal and surety have caused this instrument to be executed this 4th day of May, 1950.

THE INDEMNITY MARINE ASSURANCE COMPANY, LIMITED,

By its general agent
THE BONDING AND INSURANCE AGENCY, LIMITED,

[Seal] By /s/ HERMAN LOUIS,
Its President.

Principal.

UNITED STATES FIDELITY AND GUARANTEE COMPANY,

[Seal] By /s/ JOHN F. HRON,
Its Attorney-in-Fact.

Surety.

Duly verified.

[Endorsed]: Filed May 5, 1950.

[Title of District Court and Cause.]

CITATION ON APPEAL

To the Libelant above named:

To Hyman M. Greenstein, 501 Merchandise Mart Building, Honolulu, Hawaii, Proctor for Libelant:

Whereas the respondent herein, The Indemnity Marine Assurance Company, Limited, has lately appealed to the United States Court of Appeals for the Ninth Circuit from the entry of a final decree in favor of the libelant and against the respondent, which final decree was entered in the District Court of the United States for the District of Hawaii on April 25, 1950;

You are therefore cited to appear before the United States Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, State of California, forty days after the date of this citation to do and receive what may appertain to justice to be done in the premises.

Given unto my hand in Honolulu, City and County of Honolulu, Territory of Hawaii, on the 5th day of May, 1950.

/s/ D. E. METZGER,
United States District Judge.

Receipt of copy acknowledged.

[Title of District Court and Cause.]

ASSIGNMENTS OF ERRORS

Comes now the respondent-appellant, The Indemnity Marine Assurance Company, Limited, and hereby assigns as error in the proceedings, orders, findings, conclusions, decision and decree of the above District Court in the above entitled cause, the following:

1.

That the District Court erred in rendering and entering its "Findings As Gleaned and Construed from Evidence" dated April 19, 1950, embodying its findings of fact, conclusions of law and opinion herein.

2.

That the District Court erred in rendering and entering its final decree herein dated April 25, 1950.

3.

That the District Court erred in failing to find and hold that respondent had issued to libellant a more comprehensive policy of marine insurance at a higher rate than the policy sued upon and covering the year December 8, 1948 to December 8, 1949, and that libellant had procured said comprehensive policy to be cancelled and the policy sued upon to be issued by respondent covering total and constructive total loss only at a cheaper rate.

4.

That the District Court erred in finding and holding that neither libellant nor her husband ever saw the policy sued upon or addendum thereto issued by respondent and that they were given no opportunity to read the same.

5.

That the District Court erred in finding and holding that on Wednesday, June 8, 1949, the vessel's keel was badly battered and damaged with parts thereof carried away.

6.

That the District Court erred in finding and holding that libellant decided on June 8, 1949, to abandon the vessel as a total loss.

7.

That the District Court erred in finding and holding that libellant on June 8, 1949, telephoned Captain Hagood not to come to the vessel with his tug to undertake salvage operations.

8.

That the District Court erred in finding and holding that libellant on June 8, 1949, told the Coast Guard he was abandoning the vessel and to tell respondent such notice.

9.

That the District Court erred in finding and holding that libellant on June 9, 1949, told Captain Hagood he had abandoned the vessel.

10.

That the District Court erred in finding and holding that libellant on June 9, 1949, after discussing with the vessel's builder the position and condition of the vessel and getting his advice, was confirmed in his judgment and decision to abandon the vessel as an irredeemable total loss.

11.

That the District Court erred in finding and holding that the libellant on June 10, 1949, told respondent he had talked with the vessel's builder and the Coast Guard; that he had reached the decision it would be unwarranted risk and useless to undertake salvage and rebuild the vessel; that he had abandoned the vessel; and that he had, before leaving Maui on June 8, 1949, asked the Coast Guard to advise respondent of such surrender of the vessel.

12.

That the District Court erred in finding and holding that libellant on June 10, 1949, told libellant's attorney that he was abandoning the vessel.

13.

That the District Court erred in finding and holding that on June 10, 1949, respondent's attorney told libellant's husband to come back and bring his wife on June 13, 1949.

14.

That the District Court erred in failing to find and hold that libellant first discussed the stranding of the vessel with respondent and with respondent's attorney on June 13, 1949.

15.

That the District Court erred in failing to find and hold that the letter written by libellant's attorney dated June 14, 1949, to respondent advised that the vessel had suffered total loss and notified respondent that libellant had abandoned the vessel and in failing to find and hold that said letter when received by respondent was the first notification to respondent of abandonment of the vessel by libellant.

16.

That the District Court erred in finding the holding that Captain Hagood upon tying the vessel to Kaunakakai wharf on June 14, 1949, and before leaving Kaunakakai told one Yamamoto that he could have the vessel if he moved it away from the wharf.

17.

That the District Court erred in failing to find and hold that testimony by Captain Hagood that he would not have accepted the wreck as a gift had reference to his inspection of the vessel in September 1949 after the vessel had been removed from the water, stripped and dismantled.

18.

That the District Court erred in failing to find and hold that crushing of the vessel's sponsons was caused by the actions of third parties in removing the vessel from water to shore and in finding and holding that such damage was done by respondent in righting the vessel in the water.

19.

That the District Court erred in finding and holding that neither respondent nor libellant replied to letter of King, Limited, dated July 16, 1949, stating the intention of that corporation to cannibalize and destroy the vessel and in failing to find and hold the respondent, libellant and King, Limited, each denied to the Board of Harbor Commissioners that it held any interest in the vessel.

20.

That the District Court erred in finding and holding that respondent in this suit questioned the right of libellant to refuse to take over the vessel at

Kaunakakai and in concluding and deciding that libellant was justified in refusing to take possession and control of the vessel at Kaunakakai.

21.

That the District Court erred in finding and holding that respondent undertook to salvage the vessel after receiving notice of libellant's abandonment thereof and in failing to find and hold that all efforts of respondent to protect and salvage the vessel were both undertaken and completed prior to receipt by respondent of any notice given by libellant of abandonment of the vessel.

22.

That the District Court erred in finding and holding that respondent abandoned the vessel at sea and in concluding and deciding that by such "abandonment" respondent indicated its belief that vessel could not be salvaged or was not worth further expenditure for salvage and that such "abandonment" constituted a constructive acceptance by respondent of libellant's abandonment of the vessel.

23.

That the District Court erred in concluding and deciding that on June 14, 1949, King, Limited, had the exclusive right to possession and control of the vessel and that respondent had no right to undertake further efforts on that date to protect and salvage the vessel.

24.

That the District Court erred in failing to conclude and decide that the vessel in her stranded position was not an actual total loss, was not in imminent peril of destruction and in all human probability could have then been recovered and repaired at a cost not exceeding $21,000.

25.

That the District Court erred in failing to conclude and decide that the vessel in her righted position at Kaunakakai wharf on June 14, 1949 was not an actual total loss, was not in imminent peril of destruction and could in all human probability have then been recovered and repaired at a cost not exceeding $21,000 and that the vessel could then have been recovered and repaired at a cost of approximately $7,500.

26.

That the District Court erred in failing to conclude and decide that under the policy of marine insurance sued upon no recovery could be had for constructive total loss of the vessel unless the expense of recovering and repairing the vessel exceeded $21,000.

27.

That the District Court erred in concluding and deciding that libellant was justified in abandoning the vessel and in failing to conclude and decide that

libellant abandoned the vessel without proper foundation of high probability that the vessel was then in imminent peril of destruction and that expense of recovering and repairing the vessel would exceed $21,000.

28.

That the District Court erred in failing to conclude and decide that at the time of abandonment by libellant the vessel was not a constructive total loss within the terms of the policy sued upon and that libellant had no right to abandon the vessel and claim under the policy for constructive total loss.

29.

That the District Court erred in failing to conclude and decide that the policy sued upon required the libellant to sue, labor and travel for the defense, safeguard and recovery of the vessel.

30.

That the District Court erred in failing to find and hold that libellant failed to make reasonable, proper and practicable efforts to save and conserve the vessel and that libellant failed to make any effort to save and conserve the vessel after demand therefor by respondent made prior to any attempt by respondent to salvage the vessel and in failing to conclude and decide that such failure of libellant operated to bar recovery upon the policy for constructive total loss of the vessel.

31.

That the District Court erred in failing to conclude and decide that the policy sued upon expressly declared and provided that no act of respondent in recovering, saving or preserving the vessel should be considered as a waiver or acceptance of abandonment and that the acts of respondent in procuring the salvage and recovery of the vessel did not constitute a constructive acceptance of abandonment by libellant of the vessel.

32.

That the District Court erred in concluding and deciding that libellant was entitled to recover upon the policy for constructive total loss of the vessel.

Dated: Honolulu, Hawaii, May 5, 1950.

ROBERTSON, CASTLE & ANTHONY,

By /s/ ROBERT E. BROWN,
Proctors for Respondent.

Receipt of copy acknowledged.

[Endorsed]: Filed May 5, 1950.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF APOSTLES ON APPEAL AND PRAECIPE THEREFOR

To the Libelant above named:

To Hyman M. Greenstein, 501 Merchandise Mart Building, Honolulu, Hawaii, Proctor for Libellant:

To William F. Thompson, Jr., Clerk, United States District Court for the District of Hawaii:

The Appellant, respondent above named, hereby designates and requests that the record on appeal in the above-entitled cause shall include the following:

1. Libel in personam, Exhibit "A" annexed thereto, and monition filed July 6, 1949;

2. Answer filed November 3, 1949;

3. Findings, conclusions and opinion filed April 19, 1950;

4. Final decree filed April 25, 1950;

5. Bill of costs filed April 25, 1950;

6. Petition for appeal and order allowing appeal filed May 5, 1950;

7. Bond on appeal filed May 5, 1950;

8. Citation on appeal;

9. Assignments of error proposed by Appellant;

10. Transcript of the record of all oral testimony adduced at the trial herein;

11. All documents, records and papers admitted into evidence at the trial herein;

12. All of the clerk's minutes in all matters pertaining to the above-entitled cause.

Dated: Honolulu, Hawaii, May 5, 1950.

ROBERTSON, CASTLE & ANTHONY,

By /s/ ROBERT E. BROWN,
Proctors for Repsondent-Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 5, 1950.

In the United States District Court for the Territory of Hawaii

Admiralty No. 417. Suit on Maritime Insurance Policy

FULGENCIA D. CADIENTE,

Libelant,

vs.

THE INDEMNITY MARINE ASSURANCE COMPANY, LIMITED,

Respondent.

TRANSCRIPT OF PROCEEDINGS

In the above-entitled matter, held in the U. S. District Court, Honolulu, T. H., on January 16, 1950, at 9:38 a. m.,

Before: Hon. Delbert E. Metzger,
Judge.

Appearances:

HYMAN M. GREENSTEIN,
Proctor for Libelant;

THOMAS M. WADDOUPS, and
ROBERT E. BROWN, of
ROBERTSON, CASTLE and ANTHONY,
Proctors for Respondent.

The Clerk: Admiralty No. 417, Fulgencia D. Cadiente, Libelant, versus The Indemnity Marine Assurance Company, Limited, Respondent, for trial.

Mr. Greenstein: Ready for the Libelant.

Mr. Waddoups: Ready for the Libelee.

The Court: You may proceed.

Mr. Greenstein: If the Court please, very briefly this is a suit on a maritime insurance policy in which the Libelant is going to attempt to prove that there was a constructive total loss on the fishing sampan insured by the Respondent herein, and that the amount of the insurance, $10,500, is payable by virtue of the terms of the policy.

I should like to call as our first witness Mr. Hiberley.

WARDE C. HIBERLY

A witness in behalf of the Libelant, being duly sworn, testified as follows:

Direct Examination

By Mr. Greenstein:

Q. Will you state your name, please, sir?

A. Warde C. Hiberly.

Q. And what is your profession or occupation?

A. Assistant Collector of Customs, Customs District Thirty-two.

Q. That is this district, is it not? [1*]

A. That is correct.

*** Page numbering appearing at top of page of original Reporter's Transcript.**

(Testimony of Warde C. Hiberly.)

Q. And where is your office, sir?

A. Federal building, Honolulu.

Q. And is it one of the functions of your office to register vessels that sail the Hawaiian waters?

A. That is correct.

Q. Have you had occasion to examine the records of your office relative to a vessel known as the "Miss Philippine"?

A. I have.

Q. And to whom was a permanent license issued covering the Oil Screw "Miss Philippine"?

A. To Mrs. Fulgencia Domingo Cadiente.

Q. And according to your records she was the owner of that boat on the 6th day of June, 1949?

A. That is correct.

Q. Have you also examined your records to see whether or not Mrs. Fulgencia was a registered owner of any other boat?

A. I have.

Q. And is she the registered owner of any other boat?

A. She is not, according to the records on file in our office.

Q. Now, what license was issued to her?

A. Permanent license No. 16 [2]

Q. And does she still hold that license?

A. That has been surrendered.

Q. Upon whose request was it surrendered, if you know?

(Testimony of Warde C. Hiberly.)

A. On the request of this office, of my office.

Q. Why did your office request the surrender?

A. The vessel was stranded and abandoned.

Mr. Waddoups: May I have that last question?

(The Reporter read the last question and answer).

Mr. Greenstein: You may question.

Mr. Waddoups: No questions.

Mr. Greenstein: Thank you.

(Witness excused).

IRVING H. PARIS

a witness in behalf of the Libelant, being duly sworn, testified as follows:

Direct Examination

By Mr. Greenstein:

Q. Will you state your name, please, sir?

A. Irving H. Paris.

Q. And by whom are you employed, Mr. Paris?

A. The Bank of Hawaii.

Q. And do you come here today as a representative of the Bank of Hawaii in pursuance to a subpoena issued on the bank? [3]

A. I do.

Q. Do your records show a loan to a Fulgencia D. Cadiente in connection with a sampan, "Miss Philippine"?

(Testimony of Irving H. Paris.)

A. They do.

Q. And how much was that original loan?

A. Five thousand dollars.

Q. Has that amount been paid off?

A. It has.

Q. When?

A. On June 21, 1949.

Mr. Greenstein: May I ask that this be marked as Libellant's first exhibit for identification? (Referring to a document)

The Clerk: Libelant's Exhibit No. 1 for identification.

(The document referred to was marked "Libelant's Exhibit No. 1 for Identification".)

Mr. Greenstein: This is a policy. (Handing a document to Mr. Waddoups.)

Q. (By Mr. Greenstein): I show you Libelant's Exhibit No. 1 for Identification, which purports to be an insurance policy, and ask you whether or not the Bank of Hawaii has waived its rights under the loss payable clause there?

A. It has.

Q. So that the Bank of Hawaii has no interest in that policy? [4]

A. That is correct.

Q. And this is the regular Bank of Hawaii stamp on it? A. Yes, sir, it is.

Mr. Greenstein: Reading into the record: "Claim waived. Bank of Hawaii." With a signature, "June 2, 1949."

(Testimony of Irving H. Paris.)

Mr. Waddoups: No questions.

Mr. Greenstein: That's all.

(Witness excused.)

Mr. Greenstein: If the Court please, my next witness is out of order. He tells me that he has to go back on his boat. They are going out tonight. I didn't wish to call him at this stage, but I now wish to call him out of order.

Mr. Waddoups: No objection.

Mr. Greenstein: Mr. Hagood.

CHARLES P. HAGOOD

a witness in behalf of the Libelant, being duly sworn, testified as follows:

Direct Examination

By Mr. Greenstein:

Q. Will you state your name, please, sir?

A. Charles P. Hagood, Charles P.

Q. What is you business or occupation, Mr. Hagood?

A. I am the master of the Motor Vessel "Mazie C," M-a-i-z-i-e, and initial C.

Q. And that boat is operated by what company, if you know? [5]

A. It is operated by King, Limited.

Q. Are you familiar with the vessel known as the "Miss Philippine"?

(Testimony of Charles P. Hagood.)

A. Yes, I am.

Q. Calling your attention to some time in the middle of June, 1949, did you have occasion to attempt salvage operations on the "Miss Philippine"?

A. Yes, I did.

Q. I show you a U. S. Hydrographic Office map No. 4116 and ask if you are familiar with such a map? (Showing a map.) A. Yes, I am.

Q. You have that in your own cabin in your vessel? A. Yes, I have.

Q. And was that map used in connection with your salvage operations with the "Miss Philippine"?

A. Yes, I used this in navigating to the spot.

Mr. Greenstein: We should like at this time to offer it in evidence. Is there any objection?

Mr. Waddoups: No objection.

The Clerk: That will be Libelant's Exhibit "A."

(The map referred to was received in evidence as Libelant's Exhibit "A.")

Q. (By Greenstein): Now, Mr. Hagood, under whose authority and direction did you commence the salvage operations? [6]

A. Actual salvage operations was commenced under the authority of Mr. Matthew of the insurance and bonding agency. He was representing the insurers of the vessel.

Q. And it is clear, though, that neither of the

(Testimony of Charles P. Hagood.)

Cadientes authorized you to undertake the salvage operations, is that correct?

A. At one time he did. He later rescinded that authority.

Q. But your specific salvage operations upon which you embarked were not as a result of any instructions on the part of the Cadientes?

A. No, they were not.

Q. As a matter of fact, they were in pursuance to a charter agreement, were they not?

A. Yes, that's right.

Q. Between King Limited and the insurance company? A. Yes.

Q. Do you have a log or some memorandum with you in telling us just what your operations consisted of, the date you started, and the story of the attempted salvage, salvaging of the "Miss Philippine"?

A. Yes, I do. I have the log, I have the log of the "Maizie C" which gives simply the operations of the "Maizie C" as involved in the salvage operations, and I also have a copy of a report which I submitted to the insurance company [7] upon completion of the salvage job.

Q. Now, could you tell us in your own words about the salvage operations commencing with the time you left Honolulu and the dates and various places, referring to your log if you will, if you need to, and tell us when you started, when you left Honolulu, when you arrived where the "Miss

(Testimony of Charles P. Hagood.)

Philippine" was, and how you got it off the reef, if you did, and so forth and so on? Can you do that? A. Yes, I think so.

Mr. Waddoups: May we see the log first? (Witness hands a book to Mr. Waddoups.)

A. Started the job on Friday, 10 June, 1949. Shall I give you an account of the operations?

Q. Will you give us a detailed account starting with the time you left Honolulu to where the "Miss Philippine" was?

A. On Friday the 10th of June, 1949, I got under way with the "Maizie C" at 1903 hours, to Kaupo, Maui——

Q. Under way from where?

A. From Pier 5, Honolulu. I arrived at Kaupo, Maui, at 0945 on Saturday the 11th of June, and anchored and commenced rigging up the necessary equipment to attempt to pull the vessel off the rocks.

Q. Where was the "Miss Phillippine"?

A. The "Miss Philippine" was lying at about the high [8] water mark on a rocky shore on the windward side of the island of Maui.

Q. Mr. Hagood, are you able to go to the blackboard and show us on Exhibit 1 where Kaupo, Maui, is? A. Yes.

Q. Put that in a red circle. (Witness writes on map.) Will you resume the stand, please? Will you continue in your story and tell us about the salvage operations?

A. The "Miss Philippine" was lying broadside

(Testimony of Charles P. Hagood.)

on the beach on a rocky shore at about the high water mark, rocking heavily every time a swell hit her, and beating up her bottom pretty badly. So after anchoring in seven fathoms of water, I put my boat in the water and went ashore to survey the wreck. It was necessary to float my supplies in to the beach on a rubber flotation bag, bags which I brought along for the purpose of keeping the vessel afloat once it came off. And I went in through the surf. It was rather difficult to get ashore because there wasn't any good landing there. The only way I could get in was to swim ashore. It was impossible to beach a boat. I went aboard the wreck and made a hasty inspection of it and satisfied myself that the wreck would not come apart if I were to get it off the beach.

I rigged up a towing bridle on the wreck, consisting of a 7/8 steel wire bridle which I passed all the way around the wreck, and secured it to the wreck so it wouldn't drop [9] off. Then I shackled in a towing hawser which I had to run ashore from the salvage vessel, the "Maizie C." The towing hawser was a 10-inch manila hawser.

At 1730 hours on Saturday, the 11th of June, the preparations were complete for pulling the wreck off the beach. So I took the strain and commenced heaving of the wreck. The wreck moved seven or eight feet and then, as the tide was ebbing, it stopped moving. I went ashore and talked with Mr. Gallagher of the American Bureau of Shipping

(Testimony of Charles P. Hagood.)

and requested that he secure a bulldozer to assist in moving the wreck; if necessary, to wait for the high tide again tomorrow before I could start pulling on the wreck. So I eased off the strain on my tow line and prepared to lay there overnight, to prepare to wait for the next tide.

On Sunday, the 12th of June, at 1145 in the morning, I tightened up my towing hawser and started to take the strain. Mr. Gallagher had secured a bulldozer from the Kaupo Ranch and had the bulldozer operator assist me in pulling the wreck off by pushing the bulldozer from the shore. At 1400 hours on Sunday the wreck started to move. At 1430 the wreck came off the rocks and into deep water. It immediately started to list, keel over to one side, and I started heaving the towing line to bring the wreck alongside of the—before I could get the wreck alongside, the wreck turned over. It was floating bottom side up. There was [10] no danger of it going down because I had rubber floatation bags inside which neutralized the weight of the thing and kept it afloat.

I got away from Kaupo at about 1535 that afternoon, and my original plan was to go to Kihei Landing and secure the landing there. I continued towing the vessel upside down toward Kihei Landing, but on arriving at Kihei Landing I determined that it was impractical to put it in there because it would probably break up due to the surge that was running at the landing. I changed my plans

(Testimony of Charles P. Hagood.)

and decided that the nearest safe port was Kaunakakai, Molokai. So I continued to tow the vessel to Kaunakakai.

Q. Mr. Hagood, I wonder if you would interrupt at this time and show us the route which you took on the map?

A. Commencing at the scene of the wreck at Kaupo, I ran down the coast of Molokai—Maui, that is—because the weather was making up and I didn't want to take a chance on running a shorter run around Kahului, because it is all on the windward side and I couldn't get the wreck in its capsized condition in Kahului without breaking up. So I took the easier but longer way downwind until I got into the lee of Maui, and then running into Puunoa, which is smooth water, I continued down towards Kaunakakai. At this point here (indicating on map) off Lahaina, Maui, the weather was very smooth, the water was very smooth. [11]

In the early morning I went back in a skiff and went aboard the wreck and made an inspection of the condition of the wreck before I ventured to take her across the open channel into Kaunakakai. The inspection of the wreck convinced me that it was in good enough shape to take it into Kaunakakai. I will give you a detailed finding but I will have to refresh myself continuing——

Mr. Waddoups: At this time, so that everything may be clear, we'd like to make it plain that by not objecting to his use of the word "wreck"

(Testimony of Charles P. Hagood.)

we are not admitting that it was a wreck. I assume he is using that as a nautical term.

Mr. Greenstein: I will concur in that. It is being used, I am sure, just as a nautical expression.

The Court: All right. There is nothing to worry about. Go ahead.

A. (Continuing): From Lahaina I proceeded across Kalohi channel to Kaunakakai. I arrived at Kaunakakai early in the morning.

Q. Would you mark that with a circle also? (Witness writes on map.)

A. I arrived at Kaunakakai early in the morning, took the wreck, "Miss Philippine," in and secured it to Kaunakakai dock in deep water, smooth water with no breakers. And, as my contract with the insurance company had already expired, as soon as I made the vessel fast to Kaunakakai dock I got [12] under way to Honolulu and returned to Honolulu and left the wreck secured to Kaunakakai dock in no danger of any further damage from the wind or weather.

The Court: Well, is there a wharf at Kaunakakai?

The Witness: Yes, there is a wharf at Kaunakakai that is used——

The Court: I meant at Kihei. You referred that you took her to Kihei.

The Witness: There had been a wharf at Kihei

(Testimony of Charles P. Hagood.)

the last time I was in there, which was in 1946. However, its existence was somewhat doubtful in my mind as I hadn't been in there since 1946 and I heard rumors that the Army was intending to take it out, to demolish it. So rather than waste the time to run into Kihei and look and come out again, I decided, since the weather was so smooth, to continue right on to Molokai where I knew there was cranes on the dock that were capable of lifting the wreck and do the work on it. At Kihei there were no cranes and no facilities whatsoever for dry-docking or salvaging operations. I didn't go into Kihei at all because I was moving so slowly and it would have taken four or five extra hours.

Q. (By Mr. Greenstein): Will you resume your chair, please. Now, Mr. Hagood, the "Miss Philippine" was being towed that entire route bottom side up, was it not? [13]

A. Yes, that's right. It was bottom side up.

Q. Now, didn't the original charter party between your company and the insurance company call for the towing of that vessel to Honolulu?

A. I never saw a copy of the charter agreement. I was acting only under verbal orders from my superiors in the organization. I don't know what the charter called for. My instructions were to go and attempt to salvage the wreck and to deliver it to the nearest safe port and to use my judgment throughout wherever, in whatever way I thought advisable.

(Testimony of Charles P. Hagood.)

Q. Do I understand, then, that as skipper of the "Maizie C," the salvage vessel, you never intended to attempt to bring the "Miss Philippine" all the way to Honolulu?

A. My original plan was to take it to Kahului, Maui. I discussed that with Mr. Gallagher of the American Bureau of Shipping. And I went so far as to call Kahului Railroad who owns the only dry-docking facilities on Maui, and make arrangements for housing "Miss Philippine" in the event I should successfully get it to Kahului. But as I said, in my judgment I determined that it would be wiser to take the longer and smoother route rather than attempt to tow her through rough water on the windward side of Maui.

Q. Well, when you towed her alongside of Kaunakakai—are there facilities there for repairing or docking the [14] vessel?

A. There are no repair facilities but there were two cranes, two large pineapple cranes that I believed were capable of picking the wreck out of the water. She was subsequently picked out of the water by one of those cranes and is now ashore in Kaunakakai in the back yard of a friend of mine.

Q. I beg your pardon?

A. In the back yard of a friend of mine up in Kaunakakai, a fellow by the name of Hanky Yamamoto.

Q. Mr. Hagood, when was the last time you saw this boat?

(Testimony of Charles P. Hagood.)

A. Some time in September. I can refresh my memory from my log, if you will allow me to. It was on Friday, the 30th of September. I was in Kaunakakai with the "Maizie C" and I went ashore and contacted Mr. Yamamoto and went with him to his house, took a look at "Miss Philippine" where he had it sitting up on blocks in his back yard.

Q. Will you describe the condition of the "Miss Philippine" as you then saw it?

A. Yes, I can. It was pretty badly beaten up. The engine had been removed. The pilot house had been, and cabin, had been completely taken off. The hull had been pierced, the hull planking had been pierced and a large timber pierced right through the planking in order to support it on blocks, [15] because the keel was pretty badly shot up.

Q. How about the bottom of the boat? In what condition was that?

A. The bottom of the boat had approximately 50 per cent of the planking of it, I'd say at a rough guess, stripped off of it, either broken off or stripped off. And the keel was chafed but not completely destroyed. I would say the deepest nick in the keel was roughly 60 per cent of the entire strength of the keel. About 10 or 12 ribs were missing in the engine room, and the sponsons had been crushed in by the wire rope slings that Mr. Yamamoto had passed around the vessel so that the crane could pick it up and swing it over on to the dock. A con-

(Testimony of Charles P. Hagood.)

siderable amount of that damage was done in picking it out of the water and setting it on the dock. It wasn't all done by the action of the wind and waves. Also there were worms, marine worms, starting into the chafed sections of the hull planking where the bottom was painted and knocked off, and the planking had been splintered and torn. The marine worms had got a pretty good start in there, too.

Q. So that the vessel, when you last saw it, was or was not in a seaworthy condition?

A. It was definitely not in a seaworthy condition. In fact, it had no further value to me as far as I could see. I wouldn't have taken it as a gift at that point. [16]

Q. Could you characterize its condition at that time as a total loss from the standpoint of a fishing vessel?

Mr. Waddoups: We will object to that question, your Honor, on the ground that the condition of the vessel at that time in September 30th, as to whether or not it was a total loss, is immaterial here because there is a statement that has been made that the ship had been abandoned by the owner. That is not the time to measure whether or not under the terms of the policy it was a total loss or a constructive total loss, that could be determined at the time of going ashore. We submit that what its appearance was on September 30th, three months after the beaching occurred, is not material to this inquiry.

(Testimony of Charles P. Hagood.)

Mr. Greenstein: I'd like to submit that under the rider of the same policy, which we have not yet introduced into evidence, we are going to argue that the ultimate condition of the vessel is of importance and is relevant. May we ask that the question be permitted to go in, subject to renewed objection?

Mr. Waddoups: There is a further objection to this question. The testimony of this witness is that a considerable amount of the damage that was reflected by the appearance of the boat on September 30th, 1949, was caused by the operation and lifting it out of the water and beaching it, putting it into Yamamoto's back yard. [17]

The Court: Answer the question.

(The Reporter read the last question.)

A. I am not a fisherman and therefore I don't feel that I am thoroughly qualified to say whether it could be used as a fishing vessel or not. I have already stated that at the time I saw the wreck in Mr. Yamamoto's back yard that its condition was such that I would not have accepted it as a gift. I think that answers your question.

Mr. Greenstein: If the Court please, I am not too familiar with the rules here, but if permission is necessary I should like to be able to put him on, on the theory of this witness, as an adverse witness from here on.

Mr. Waddoups: This witness is not a party,

(Testimony of Charles P. Hagood.)

your Honor. I don't see how he can be called an adverse witness.

The Court: Proceed.

Q. (By Mr. Greenstein): Mr. Hagood, isn't it a fact that the last time I talked to you in describing the condition of the boat you characterized it as being a total wreck, when you last saw it in Yamamoto's back yard?

Mr. Waddoups: Objected to as leading, your Honor.

The Court: The objection is overruled.

A. In my opinion it was as I said, a total wreck. I would have no use for it. I couldn't possibly consider it to be of any value. However, other people do think that [18] it might have value, namely, Mr. Yamamoto. He thinks he's got something that is worth some money. He told me so at the time.

Mr. Greenstein: I move that that be stricken as not responsive to the question.

The Court: All right.

Q. (By Mr. Greenstein): Mr. Hagood, can you tell us something about the character of the waters between your point of origin, Kaupo, and the Island of Oahu from the standpoint of waters being rough or calm, with respect to or from Maui to Oahu?

Mr. Waddoups: That is, if he was coming to Oahu. That is not proper. He said his instructions were to put it into the first safe port.

The Court: Well, it doesn't appear to me to be

(Testimony of Charles P. Hagood.)

in any manner material. But since it is preliminary, you may answer the question.

A. From Kaupo to Lahaina, Maui, you are traveling mostly in the lee of the prevailing winds, and it is very smooth, under normal tradewind conditions. As soon as you come out from behind the northwest point of Maui, you encounter tradewinds sweeping down the channel between Maui and Molokai. It is still a trifle rough but not as rough as the channel between Molokai and Oahu. As you can see (referring to map), the channel between Molokai and Oahu [19] is much wider than the one between Molokai and Maui, and it is a much longer trip and there is little or no protection from the wind and the waves that prevail in normal tradewind weather.

Q. So isn't it a fact, Mr. Hagood, that the reason you didn't continue to tow the vessel to Honolulu is because of that channel and the condition of the "Miss Philippine"?

A. That's right. In her capsized condition she made a very heavy drag, and I was only able to move it very slowly.

Q. How fast were you going, by the way, average?

A. Approximately one and eight-tenths knots per hour. That is very slow. And it would have taken me nearly two days to—well, I will revise that—make it 30 hours. It would have taken me about 30 hours to tow the wreck at the speed that

(Testimony of Charles P. Hagood.)

I was making from Kaunakakai on into Honolulu. And I was afraid at that time that the weather would increase in intensity and I stood a chance of losing the wreck in the channel between Molokai and Oahu.

Mr. Greenstein: Your witness, Mr. Waddoups.

Cross-Examination

By Mr. Waddoups:

Q. Mr. Hagood, you first saw this boat under directions of Mr. Cadiente, did you not?

A. That's correct.

Q. The first time you saw her after she went ashore? [20] A. Yes.

Q. And that was on June 7, 1949, is that correct?

A. Do you mind if I refresh my memory from my log? These dates are a little bit vague in my mind.

Q. You may.

A. That's right, Tuesday afternoon of June 7, 1949.

Q. On that occasion you flew over to the wreck by charter plane from Kahului, is that correct, or from Wailuku?

A. Yes, from Maui I chartered a small plane and flew over the wreck with the idea of determining whether the wreck was salvagable, and also scouting out the approaches to the wreck and locating possible shoals and rocks and other danger

(Testimony of Charles P. Hagood.)

that would beset my vessel in going in to attempt to salvage it.

Q. And on that occasion did you land the plane and go down and examine the vessel?

A. No, I didn't.

Q. How low did you fly around the vessel?

A. The pilot told me that our altitude was approximately 150 feet from the vessel while we were circling the wreck. We circled the wreck for about 20 minutes at an altitude of about 150 feet while I satisfied myself that I could get the wreck off into deep water.

Q. And did you advise Mr. Cadiente as to whether or not this vessel was salvagable at that time? [21]

Mr. Greenstein: That is objected to, if the Court please, as being beyond the scope of cross-examination. It might be proper if Mr. Waddoups later wants to make this witness his own witness.

The Court: I think the objection is well taken.

Q. (By Mr. Waddoups): Did Mr. Cadiente at any time tell you to salvage the vessel, Mr. Hagood?

Mr. Greenstein: That is objected to for the same reason.

Mr. Waddoups: He has stated on direct examination that he started the salvage at one time and then quit. I want to know at whose instructions it was that he started and then gave up salvage operations the first time.

Mr. Greenstein: I will withdraw that objection.

(Testimony of Charles P. Hagood.)

A. Mr. Cadiente authorized me to proceed with the salvage operation on the vessel when I met him at Hana airfield after landing, after I had scrutinized the wreck from the air.

Q. On June 7th? A. That's right.

Q. And did he later withdraw that authorization to salvage? A. Yes, he did.

Q. And when was that?

A. He sent me a message via the U. S. Coast Guard [22] duty officer in the Federal Building in Honolulu which I received at about 10:30 Wednesday morning, June 8, 1949, cancelling the job, as in Mr. Cadiente's opinion the wreck is beyond salvage. That was the message as I received it relayed through the Coast Guard. I don't know how Cadiente contacted the Coast Guard, but that is the way I got the message.

Mr. Cadiente appeared in my office the following day, Thursday morning, and personally confirmed the order to cease operations.

Q. And, Mr. Hagood, do you remember the condition of that vessel on June 7th when you first saw her and her condition when you began salvage operations under the directions of the insurance company?

A. What I saw from the air didn't show me anything as to the condition of the bottom of the vessel.

Q. So you are unable to make it?

(Testimony of Charles P. Hagood.)

A. I am not qualified to say. Externally she appeared just about the same.

Q. Did you make an examination of that hull prior to your salvage operations?

A. The first examination I made of the hull was on Saturday morning, the 11th of June. That was the first close examination I made of it. Up until then the nearest I had been was about 150 feet away up in the air in an [23] airplane. However, her position hadn't changed on the rocks. She was lying just about the same way. She hadn't gone farther up and she didn't seem to have changed in her position at all, mainly because the weather was fairly smooth at the time.

Q. And was the condition of her hull at that time such as believed you to think that you could pull her out hull down, keel down I mean? What I am getting at, Mr. Hagood, is, you felt from your examination that you could successfully tow her?

A. Yes, I would, definitely, or I wouldn't have undertaken it.

Q. And was the condition of her hull at that time any different than the condition of her hull was on September 30th when you saw her in Yamamoto's yard?

A. She was in a lot better condition on the 10th of June when I first examined her than she was on September 30th in Mr. Yamamoto's back yard.

Q. Well, you mean a lot better? How would you

(Testimony of Charles P. Hagood.)

describe her? What was the damage to her hull that you noticed before you started salvage operations?

A. As near as I could determine when I went aboard her, her keel was still intact although chafed on the bottom. There were four or five ribs knocked out in the engine room. The fore peak, forward compartment of the vessel, was knocked [24] out. The engine bed was intact and the engine was tightly secured to the engine bed.

The bottom planking was about 25 per cent gone. All of this is a rough estimation as it was very difficult to make a close examination of the wreck because the waves were breaking over it and the wreck was slamming back and forth from one side to the other with considerable violence. And their plan was rather important to me. I didn't waste too much time looking things over. I simply made, satisfied myself that the wreck would stay together and wouldn't come apart when I started pulling on it, and also satisfied myself that when I took it off it would remain towable. I could handle it once I took it off. The fact that it finally turned turtle after I took it off was due to the flotation bags that I lashed inside the hull shifting and becoming jammed and putting the center of gravity of the wreck too high. The center support was too low. That's why she turned turtle.

Q. Now, Mr. Hagood, recalling the vessel's position on that shoreline and the nature of it, the

(Testimony of Charles P. Hagood.)

rocking, the rocky nature of the land, was she so situated on that beach so that in your opinion her hull and keel could be damaged by changing tides, by action of the ocean?

A. Yes, very definitely. She was sitting on a rocky beach. To pull a boat—and on the windward side of the [25] island she had no protection whatsoever, and the waves were breaking against her and every time a wave would hit her she would rock from one side to the other on her keel, slam down on her ribs with the force of a piledriver, it seems like, when I was inside her.

Q. So that it is a reasonable thing to state, is it not, that the longer she stayed on that beach in that condition the more her damage increased by action of the ocean? A. Yes, that is true.

Q. Now, what was it, these flotation bags that you had spoken of? I'd like to get that a little clearer in my mind. You say in your opinion it caused her to turn turtle ?

A. The flotation bags are large rubberized canvas bags which can be inserted inside of a hull and blown up to provide buoyancy. I have used them from time to time in other salvage operations; when you have to have some buoyancy to keep her from going down, you use the flotation bags. So I brought these bags with me with an air compressor, and filled them with air and inserted them inside the hull before I took her from the

(Testimony of Charles P. Hagood.)

rocks, to keep her from going right on down, because her bottom was torn out of her and she wouldn't float as a boat is supposed to float. These were simply to give her additional buoyancy. They are bags about four feet in diameter and about twelve feet long, and you fill them up with air. I had three of them. [26]

Q. Now, who instructed you? Did anyone instruct you to go into Kaunakakai from your office, King Limited?

A. Yes, I was in periodical contact with the home office by radiophone, and from time to time I would call them and my instructions were to take her into the nearest safe port and leave her, as our contract with the insurance company had a fifteen hundred dollar limit on it. And the insurance company had authorized us to spend fifteen hundred dollars worth of charter time on it and to go no further unless I received authorization in writing from Mr. Gallagher of the American Bureau of Shipping. He was representing the insurance company. The fifteen hundred dollars limit was exceeded by my calculations about the time I was abeam of Lahaina, Maui. At that time I could have taken her into Mala wharf on Maui and tied her up, but there is no crane or any salvage facilities available there and it was a bad surge, there was a bad surge on the dock that would have broken up the hull in a matter of a day or two.

I continued to tow the vessel across the channel

(Testimony of Charles P. Hagood.)
and put her into Kaunakakai. I couldn't very well abandon her in the middle of the ocean because I would have gotten into trouble with the U. S. Coast Guard for leaving a menace to the seas. So I had to take her some place and I dragged her to Kaunakakai. It was easier to drag her out and do something. [27]

Mr. Waddoups: No further questions.

Redirect Examination

By Mr. Greenstein:

Q. Mr. Hagood, I wonder if you'd be good enough to show us where Mala wharf is on the exhibit?

The Court: I don't think that is necessary. I know where it is.

Mr. Greenstein: Well, might we have that pointed out on the exhibit, if the Court please?

The Court: If it is of value to you.

(Witness writes on map.)

A. Mala wharf is on the westward shore of Maui, about a mile northwest of Lahaina, Maui.

Q. So that the fifteen hundred dollars worth was used up by the time you reached the beam of that wharf, is that correct, Mr. Hagood?

A. That's right. From there on I didn't know who was going to pay me. So I was anxious to terminate the job as soon as possible so as to cut down my own expenses and get back because I had

(Testimony of Charles P. Hagood.)

no assurance of being paid by anybody, either Cadiente or the insurance company. However, acting in the interests of whoever was the owner of the vessel—I wasn't sure who was the owner of the wreck—but acting in the interests of the owner I continued to tow it to what I considered to be the nearest safe port, because in my mind [28] the vessel still had some value.

Q. Now, in response to Mr. Waddoups' question as to one of your earlier examinations in your opinion that the vessel could be towed into the harbor, do you mean it could be towed into Honolulu Harbor?

A. Towed into Honolulu Harbor from where? I don't quite understand your question.

Q. Well, you saw the boat when she was beached at Kaupo before the salvage operations were begun?

A. Yes.

Q. And Mr. Waddoups directed questions to you relative to the condition of the boat as a result of your examinations and asked you whether or not it could be towed into the harbor, and you answered "Yes, it could be." You felt it could be towed into the harbor. And that, I assumed, was why the salvage operations began later. I ask you to tell us what you meant by the word "harbor"? Do you feel that the boat could be safely towed to Honolulu Harbor at that time?

A. At that time I hadn't foreseen the possibility of the vessel turning over. I had planned on

(Testimony of Charles P. Hagood.)

pulling it off and maintaining it in an upright position by means of the flotation bags. However, before I could bring the wreck alongside of me, it turned over and then I was unable to turn it back up again. So that necessitated a change [29] in my plans. I could have towed it to Honolulu Harbor, I believe, if it had remained in an upright position, because then I could have towed it about twice as fast. Since it was upside down and its cabin and flying bridge and the framework and everything involved in the flying bridge was sticking down in the water, it presented considerable resistance to the water as it was pulled ahead. But if it had remained in an upright position it would have towed just like a vessel; everything would have been streamlined on the bottom.

Mr. Greenstein: No further questions.

Mr. Waddoups: No further questions.

The Court: All right.

(Witness excused.)

Mr. Greenstein: Mr. Morton.

HENRY MORTON

a witness in behalf of the Libelant, being duly sworn, testified as follows:

Direct Examination

By Mr. Greenstein:

Q. Will you tell us your name, please?

A. Henry Morton.

Q. What is your business or occupation, Mr. Morton? What do you do?

A. Fishing. [30]

Q. And you work for Mr. Cadiente, is that it?

A. That's right.

Q. Were you skipper of the "Miss Philippine"?

A. That's right.

Q. Do you remember June 6, 1949?

A. Yes.

Q. Tell us what happened that day?

A. Well, on June 6, 1949, we left Hana on our way back to Honolulu. On the way coming back we stopped at Kaupo, Maui. We spotted a school of fish there, so we decided to surround that fish before we come back to Honolulu. Well, anyway, we load our nets, surround the fish. We were all in the water. We noticed the big boat was drifting. We tried to get on the boat and got on it, started the engine. The propeller and the rudder was gone. And she hit the rocks there. So we tried to pull it by hand, because the propeller and rudder was gone. We couldn't do it. The swells and the wind

(Testimony of Henry Morton.)

was so strong. Well, anyway, there's a minister there; he called for the Coast Guard. Well, we tried to pull the boat out by hand but couldn't move it.

So when the Coast Guard got there, it was too rough. They couldn't get near to our boat. So I sent two of my men to swim out to the Coast Guard and tell them that there is nothing they could do, to tow the skiff to Lahaina. We had the skiff anchored outside in the water. So I went back to [31] the boat there and tried to save what we could, but couldn't do nothing.

The next thing I noticed, the water was coming through the engine room. The bottom was broken. Then I noticed fish was drifting all around the beach there. The ice box was broken. The whole bottom was gone. So the swells was getting up bigger and the wind was getting stronger. So I didn't want nobody to get hurt, so I told them we had to abandon this ship. And the only thing we could do is wait for the boss to see what he wants to do.

Q. When did the boss come?

A. The next day.

Q. That's Mr. Cadiente you are referring to?

A. That's right.

Q. How long were you at Kaupo?

A. Three days.

Q. And did you try to get the boat off the reef?

A. That's right, but couldn't do nothing be-

(Testimony of Henry Morton.)

cause we didn't have no equipment there. The swells was so high, couldn't do nothing.

Q. Did you come down to see the boat every day?

A. That's right, every day for three days.

Q. Can you describe the condition—withdraw that. Can you describe the weather condition and the waves?

A. Well, the waves were pretty high and the wind was [32] so strong that we couldn't do nothing. The boat was just pounding on the rocks there, rolling back and forth. It was too dangerous to get on the boat to do anything.

Q. And did you then return to Honolulu?

A. On the third day.

Q. At whose request did you leave Kaupo?

A. At the boss' request.

Q. That is Mr. Cadiente? A. That's right.

Q. Was that the last time you have seen the "Miss Philippine"? A. That's right.

Mr. Greenstein: You may examine.

Cross-Examination

By Mr. Waddoups:

Q. Nobody was on board the "Miss Philippine" when the rudder and the propeller was lost, is that correct? A. No, sir.

Q. Was she anchored? A. That's right.

Q. What happened to the anchor rope, the chain?

A. The anchor chain busted.

(Testimony of Henry Morton.)

Q. And when did you first notice that she was drifting?

A. Well, about half an hour after we anchored.

Q. How far away was the big vessel from the skiff that [33] you had in getting the fish in?

A. About three hundred feet.

Q. You paddled over to her as soon as you noticed her drifting?

A. We couldn't paddle. We had to swim.

Q. You swam over to the boat?

A. That's right.

Q. You yourself?

A. Myself and the rest of the crew.

Q. The whole crew? A. The whole crew.

Q. How did you know that the rudder was gone?

A. When we started the engine, all you could hear was the engine running and you know the propeller is not in working order. So one of the boys jumped over the side and said there is no rudder and no propeller.

Q. How deep is the water there?

A. You mean where she——

Q. Where she was anchored.

A. About twelve fathoms.

Q. Was any attempt made to go down below and get the rudder and propeller?

A. No, it was too rough.

Q. Too rough? A. Too rough. [34]

Q. Too deep?

A. Not too deep but too rough.

(Testimony of Henry Morton.)

Q. Well, the weather didn't stay rough all the time, did it? It calmed down?

A. It was rough ever since I was there.

Q. Well, weren't there some low tides and some high tides?

A. Oh, yes, high tide and low tide, but still the swells there.

Q. And during low tide wouldn't she be resting pretty quietly there?

A. Not in the three days I was there.

Q. So you made no attempt to go after the rudder and propeller?

A. No, sir, because it was too dangerous.

Q. Was this a twin-screw boat or one?

A. One screw.

Q. Just one? A. That's right.

Q. How long after the boat went ashore on the beach on the rocks there did you get in touch with Mr. Cadiente?

A. Well, the next morning.

Q. Did you call him by telephone?

A. No, the Coast Guard called him.

Q. Well, when did you notify the Coast Guard to notify [35] Cadiente?

A. Well, that same—about an hour after the boat landed on the rocks on the beach, the minister there.

Q. And what time of day was it when it landed on the beach?

A. About 8:30 in the morning.

(Testimony of Henry Morton.)

Q. And was the tide a surging tide or was it ebbing at that time? A. It was high tide.

Q. Was the tide coming in or going out?

A. Coming in.

Q. And when, if you remember, did the tide reach its high peak?

A. Well, that I can't say, the highest peak.

Q. Did you get out, get off the boat and go down under and look at the hull in the water?

A. You cannot go under the boat. You had to look from the top to the bottom.

Q. Couldn't you get outside and look at it?

A. No, it is too dangerous. The boat was rolling back and forth.

Q. Were you there when Mr. Frank Gallagher of the American Shipping Board came over? You know Mr. Gallagher? A. No.

Q. Do you remember a haole man coming over there [36] during those first three days and looking over this boat? A. No, sir.

Q. You don't remember that? A. No.

Q. Where were you staying in Kaupo?

A. We are right on the beach. At night we go to Hana and sleep at Hana, on Hana wharf.

Q. But during the three days you spent all your time right there on the beach?

A. That's right.

Q. You don't remember Mr. Gallagher coming with Mr. Cadiente to look over this boat?

(Testimony of Henry Morton.)

A. Well, there were so many people there looking at the boat, I don't know who is who.

Q. Do you remember Mr. Hagood, the man who just left? Do you know Mr. Hagood?

A. I didn't see him.

Q. You didn't see him? A. No.

Q. You didn't see anybody coming around and flying around?

A. Oh, I see an airplane flying around but don't know whose.

Q. You remember that, though?

A. Yes. [37]

Q. And who directed you to abandon the ship?

A. You mean when the boat——

Q. When you and your men abandoned ship, on whose orders was that?

A. I gave the orders.

Q. You gave the order? A. That's right.

Mr. Waddoups: I have no further questions.

Mr. Greenstein: No further questions. I wonder if we might have a recess? I may need an interpreter on the next witness.

The Court: All right. We will take a brief recess. We will take a noon recess at half-past eleven.

(A recess was taken at 10:45 a.m.)

Mr. Greenstein: Mr. McAndrews.

JAMES T. McANDREWS

a witness in behalf of the Libelant, being duly sworn, testified as follows:

Direct Examination

By Mr. Greenstein:

Q. Will you state your name, please, sir?

A. James T. McAndrews.

Q. Are you an officer of King Limited?

A. Yes, I am. [38]

Mr. Greenstein: May this be marked for identification?

(A document.)

The Clerk: Libelant's No. 2 for identification.

(The document referred to was marked "Libelant's Exhibit No. 2 for Identification.")

Q. (By Mr. Greenstein): I show you Libelant's Exhibit 2 for Identification and ask you if you have ever seen that before? A. Yes, I have.

Q. Does that bear your signature?

A. Yes, it does.

Q. And is that a charter party entered into by and between the insurance company and your company relative to salvage operations of the "Miss Philippine"?

The Court: What insurance company?

Mr. Greenstein: Let's see what it is?

The Witness: Indemnity Marine Assurance Company, Limited.

(Testimony of James T. McAndrews.)

The Court: Yes.

Mr. Greenstein: That is the respondent in this case.

The Court: Oh, yes.

A. Yes, it is.

Mr. Greenstein: I'd like to offer it into evidence, if the Court please.

Mr. Waddoups: No objection. [39]

The Clerk: Libelant's Exhibit "B."

(The document previously marked for identification was received in evidence as Libelant's Exhibit "B.")

LIBELANT'S EXHIBIT "B"

Charter Party

Whereas the sampan Miss Philippines is aground in the ocean at Kaupo, Maui, Territory of Hawaii, and

Whereas, Indemnity Marine Assurance Company, Limited, hereinafter known as Charterer, is the Insurer of said sampan, and desires that an attempt be made to float and tow same to a Marine Railway at Honolulu, Territory of Hawaii aforesaid, and

Whereas, King Limited, a Hawaiian Corporation of Honolulu, Hawaii hereinafter known as Owner, owns the oil screw Maizie-C, and is willing to let the use of same to Charterer upon the terms and conditions which appear below,

(Testimony of James T. McAndrews.)

Therefore it is hereby Mutually agreed by and between Charterer and Owner, as follows:

1. Charterer agrees to hire and Owner agrees to let the oil screw Motor Boat Maizie-C, official number 236082, for the purposes and on the conditions hereinafter set forth.

2. The said vessel Maizie-C shall get underway from Honolulu on or about June 10th, 1949, and proceed to Kaupo, Maui, and there control of said vessel shall pass to Mr. Gallagher, American Bureau of Shipping Surveyor, as agent for the Charterer, and the proposed salvage operations shall be conducted by his authority and under his direction. In the event that these are successful the Master of the Maizie-C shall then tow Miss Philippines to a Marine Railway at Honolulu aforesaid.

3. Charterer agrees to pay as hire for the said Maizie-C, her crew and equipment, without discount, the following sums:

a. $15.00 per hour for the hire of the Maizie-C and her three regular crew members, computed from the time she is underway at said Honolulu, until she is again secured in said Honolulu at the end of her voyage.

b. $1.00 per hour for the hire of each of three additional crew members, their time to be computed as provided for the Maizie-C in sub-paragraph a. (above).

(Testimony of James T. McAndrews.)

c. $100.00 for the additional insurance premium which is to be charged the owners of the Maizie-C as a result of the said use.

d. Any and all other expenses incurred by the Maizie-C, her owner or agents, as a result of the said use and which are reasonably necessary thereto.

e. It is expressly agreed between the parties that if said salvage operations have not been successful at the time charges for the use of the Maizie-C, including charges for the return to Honolulu, amount to $1,500.00, said operations are to be abandoned and the Maizie-C is to return forthwith to Honolulu, unless Charterer, through its Agent on the spot, authorizes a continuation of said operations in writing.

4. Salvage attempts are to continue so long as said Mr. Gallagher deems same feasible, subject, however, to the provisions of paragraph 3. e. above.

5. If Miss Philippine is damaged or lost during the salvage operations the Charterer shall be responsible therefor, and said Charterer hereby covenants to hold the Owner harmless on account of any claim as a result of such damage or loss.

6. Charterer, in consideration of the use of the Maizie-C, her tackle, engines, and crew, expressly agrees to pay for same as specified in paragraph 3 above, regardless of the success of operations and without set off in the event said Miss Philippine

(Testimony of James T. McAndrews.)

is damaged, destroyed or lost as a result of said operations or towage, even though such damage or destruction or loss is the result of the negligence of Owner, its agents or servants.

Wherefore, the parties hereto have set their hands this 11th day of June, A. D. 1949.

INDEMNITY MARINE ASSURANCE COMPANY, LTD. By its General Agent THE BONDING AND INSURANCE AGENCY, LTD, (a Hawaiian Corporation)

By /s/ A. H. MATTHEW,
Its Charterer.
KING, LIMITED,

By /s/ JAMES T. McANDREWS,
Its Secretary.
OWNER.

Admitted January 16, 1950.

Q. (By Mr. Greenstein): Mr. McAndrews, the "Miss Philippine" was towed into Kaunakakai as part of the salvage operations of your company, was it not? A. That's correct.

Q. And you used the salvage vessel "Maizie-C" in connection with the salvage operations?

(Testimony of James T. McAndrews.)

A. Yes, that's correct.

Q. And the boat was tied up in Kaunakakai?

A. Yes. I didn't see it there myself, but so I understand it was tied up there.

Q. Where is the boat now, if you know?

A. Well, as far as I know it is in the possession of Hanky Yamamoto of Kaunakakai. I don't know where it is, though, exactly.

Q. Now, during the period of time that the boat was under the control of King, Limited, that is, after she was docked on Kaunakakai, were any attempts made to repair the vessel?

A. Well, it wasn't under our control after it was docked at Kaunakakai. And as far as the repair of the vessel is concerned, I don't know whether any attempt was made or [40] not.

Q. Well, let's put it this way: King, Limited did not attempt to return the vessel?

A. That's correct, we did not attempt to.

Q. And do you also know that neither the former owner and the insurance company attempted to repair it?

Mr. Waddoups: Objected to as leading. It is assuming something that is not in evidence.

The Court: Let me have that question.

(The Reporter read the last question.)

The Court: Sustained.

Mr. Greenstein: May we have this marked next in order for identification?

(Testimony of James T. McAndrews.)

The Clerk: Liebelant's No. 3.

(The document referred to was marked "Libelant's Exhibit No. 3 for Identification.")

Q. (By Mr. Greenstein): I show you Libelant's for Identification No. 3, which purports to be a letter from attorneys King and McGregor. I take it they are attorneys for King, Limited, your company? A. That is correct.

Q. And was that letter written in pursuance to the instructions of your company?

A. Yes, it was. [41]

Mr. Greenstein: I should like to offer a letter into evidence, if the Court please, written on behalf of King, Limited, the party attempting to salvage here. It discloses their position in interest and also refers to the interest of both the former owner and the insurance company. We think it is material.

Mr. Waddoups: Objected to on the grounds that it is immaterial and incompetent and certainly irrelevant. Nothing that King and McGregor could do that should bind the defendant in this case. They are not parties to the proceedings. Any letter that was written by them to Mr. Greenstein or anyone else has nothing to do with the liability or lack thereof of the defendant under the policy of insurance.

Mr. Greenstein: If the Court please, we respectfully submit that it is one of the links of the chain which starts with the running aground of the vessel

(Testimony of James T. McAndrews.)

and its final location in the back yard of somebody's house on Molokai.

The Court: I don't know. This seems to me to be rather far afield. The sooner we get right down to the crux of this libel suit, just what the points are in issue here, and stick close to that, the better. It seems to me that we are running around to other matters.

Mr. Greenstein: Was there a ruling by the Court on that?

The Court: Well, if you think it is important, I will [42] hear your further argument on it.

Mr. Greenstein: Well, if the Court please, it is a letter written by the attorneys for King, Limited, who have conducted the salvage operations, addressed to myself as attorney for the former owner, setting forth the position—not only referring to our position—it sets forth the position of the insurance company. It also sets forth the intent of the salvager, which would go to the ultimate question here of the condition of the vessel. We have a situation in which three people throw their hands up and say, "We don't want the boat." I respectfully submit that is indicative of the ultimate question that has to be decided here, and that is the value, if any, of the boat.

Mr. Waddoups: Well, we submit, your Honor, that what another law firm does or says in a letter to Mr. Greenstein about the value of the boat is hearsay in the first place. It is certainly not bind-

(Testimony of James T. McAndrews.)

ing upon this insurance company and has no place in this controversy.

The Court: It may be marked for identification for the time being.

Q. (By Mr. Greenstein): Mr. McAndrews, was it in pursuance to authority given by King, Limited that Hanky Yamamoto took possession of the boat?

A. Well, I wouldn't say so exactly. All King, Limited [43] did was relinquish any right that they might have had to the vessel. In other words, if we had any right, we will say, we relinquished it.

Mr. Greenstein: Thank you. No further questions.

Mr. Waddoups: No questions.

(Witness excused.)

DELESFORO CADIENTE

a witness in behalf of the Libelant, being duly sworn, testified as follows:

Direct Examination

By Mr. Greenstein:

Q. Will you state your name, please?

A. Delesforo Cadiente.

The Court: What is the first name?

The Witness: Delesforo, D-e-l-e-s-f-o-r-o, B. Cadiente, C-a-d-i-e-n-t-e.

Q. Now, Mr. Cadiente, you are the husband of

(Testimony of Delesforo Cadiente.)

Fulgencia D. Cadiente, the libelant in this case, are you not? A. Yes.

Q. And she is the registered owner of, or was the registered owner of the "Miss Philippine"?

A. Yes, sir.

Q. By the way, both you and Mrs. Cadiente are citizens of the United States, are you not?

A. Yes, sir.

Q. Now, who built "Miss Philippine"? [44]

A. Mr. Tanimura of the Kewalo Shipyard.

Q. He built the "Miss Philippine"?

A. Yes, sir.

Q. And has he built any other boats for you?

A. Yes, he did.

Q. How many others? A. "Luzon."

Q. Now, how many others?

A. Two other boats.

Q. Now, these other boats, are they in your name or in Fulgencia's?

Mr. Waddoups: Objected to as incompetent, irrelevant and immaterial. We are interested in the "Miss Philippine," not in any others.

The Court: Sustained.

(Mr. Greenstein hands a sheet of paper to Mr. Waddoups.)

Mr. Greenstein: May this be the number next in order for identification?

The Clerk: Libelant's No. 4 for Identification.

(The document referred to was marked "Libelant's Exhibit No. 4 for Identification.")

(Testimony of Delesforo Cadiente.)

Q. (By Mr. Greenstein): I show you Libelant's Exhibit No. 4 for Identification and ask you to tell us what it is?

A. This is a receipt for the building of [45] "Miss Philippine" from Tanimura.

Q. And how much did you pay for it?

Mr. Waddoups: Objected to as incompetent, irrelevant and immaterial. The value of the vessel for purposes of this investigation is set by the insurance policy itself, and it doesn't matter what he paid for it.

The Court: What is your idea?

Mr. Greenstein: We will withdraw that. It becomes important when the boat builder comes on the stand. We will not introduce it. I haven't offered it.

The Court: All right.

Q. (By Mr. Greenstein): I show you Libelant's Exhibit No. 1 for Identification and ask you what that is?

A. This is a policy for "Miss Philippine."

Q. When did you actually get that piece of paper?

A. After I paid my account with the bank.

Q. What bank? A. Bishop Bank.

Q. What bank? A. Bishop Bank.

Q. Will you look at the face of that and see what bank is mentioned?

A. Bank of Hawaii.

(Testimony of Delesforo Cadiente.)

Q. You paid off your account with the bank of Hawaii, [46] is that it? A. Yes.

Q. And they gave you that insurance policy?

A. Yes, sir.

Q. Did they have a mortgage on the "Miss Philippine"? A. Yes, sir.

Q. Will you speak a little louder, please?

Mr. Greenstein: I should like to offer into evidence the receipt showing the premium on the policy issued by the bonding and insurance agency, The Bonding and Insurance Agency, Limited, the agent of the respondent herein, bearing the same number as the policy being sued upon.

Mr. Waddoups: No objection, your Honor.

Mr. Greenstein: And at this time I should like to offer into evidence Libelant's Exhibit No. 1 for Identification.

Mr. Waddoups: No objection.

The Clerk: The premium will be Libelant's Exhibit——

The Court: That No. 1 is the release of mortgage, is it?

Mr. Greenstein: No, No. 1 for identification is the actual policy.

The Court: Oh, the policy?

Mr. Greenstein: There are two releases on there.

The Clerk: The premium will be Libelant's Exhibit "C" [47] and the policy will be libelant's Exhibit "D."

(Testimony of Delesforo Cadiente.)

(The documents referred to were received in evidence as Libelant's Exhibits "C" and "D.")

Q. (By Mr. Greenstein): Now, Mr. Cadiente, what is your relationship to the boat "Miss Philippine"? What is your connection?

A. I am operating manager and manager of the boat.

Q. And as manager for the fishing vessel, have you been the one contacted with respect to the boat itself? A. Yes.

Q. You got the insurance? And the insurance company contacted you after the loss, did they not?

A. Yes.

Q. Will you tell us in your own words, Mr. Cadiente, what you know about the "Miss Philippine" when you first saw her after this loss?

A. June 6th in the afternoon the Coast Guard from the Federal Building called me up telling me that "Miss Philippine" is on Hana, Maui.

Q. Speak slowly.

A. They was trying to contact me from noontime, but they had been unable to get me from nine o'clock. They called me again. And so I proceeded to Honolulu right away and talked to the Coast Guard. I never see him but I talked to him on the telephone, and he told me that the boat "Miss [48] Philippine" is at Hana, Maui, between plenty rock. So that's all what he told me.

And then in the morning, June 7th, I bought my

(Testimony of Delesforo Cadiente.)

ticket and fly to Maui. When I reach over there about four o'clock in the evening, and went right into the boat, where the boat was. That's Hana. So when I was there, I couldn't get near to the boat myself because the water was splashed all over the boat, but I was outside about, oh, about 25 feet away from the boat. And one side of the boat where there is no water, I can see the big hole there already. And also the water was flooding through the engine room and in the deck, under the deck. All the water splashing, and it kind of dark already, so I decided to go to Hana where the boys was.

Then early in the morning the next day—that's Wednesday—I called the boys and went back to the boat. So when we reach over there, still the water was so high that the boys was trying to get into there but I told them not to. And, well, some of the crew went swimming to the other side of the boat because we wanted to find out how is the condition of the boat, and also myself, too, look around, because I saw the water. So I see both sides of the boat, and all the keel almost gone, and some of the ribs gone. So I told the men in the boat, there is no hope in the boat anymore. So I just decided to leave the boat there and abandon the [49] boat.

Then I went to a telephone 'way up to the mountains, because I know there is no facilities over there and I cannot bring the boat back to Honolulu,

(Testimony of Delesforo Cadiente.)

because there is no equipment to bring down the boat; so I went up to the mountain and find a telephone there. Although they suggested and want to——

Q. Will you speak a little slower, please?

A. King, Limited wanted to salvage the boat. So I called up because I don't know how to get the King, Limited—I called up to the office of the Coast Guard and notified them to tell the King, Limited not to come over anymore and take the boat back.

Q. Pardon me. Was that before or after you and Mr. Hagood were out there?

A. After.

Q. Continue.

A. So it was about nine o'clock in the morning, about ten o'clock in the morning, when I come out. Then I went back again to the boat where the boys was, and still we can not get into the boat because too rough. So I told the boys, well, the best thing, the thing we cannot do here, we might as well go home; we cannot salvage the boat ourselves; there is no equipment here. So everybody take off. We went back to Hana. That's the last time that day. I come home to [50] Honolulu, went right away again to King, Limited to tell them the story that the boat was in a bad shape and it is hopeless to bring the boat back to Honolulu.

Q. So that you did not authorize the salvage operations, Mr. Cadiente, is that correct?

(Testimony of Delesforo Cadiente.)

A. No, sir.

Q. When did you next see "Miss Philippine"?

A. December 2nd.

Q. Did you go again in June?

A. Yes, I went on June 16th with the boat builder.

Q. With whom?

A. With the boat builder, to Kaunakakai.

Q. And where was the boat?

A. It was at a pier at Kaunakakai. The boat was hanging on the pier at Kaunakakai.

Q. Did you look at the boat?

A. Yes, sir, I did.

Q. Will you describe what was done so that you could look at the boat?

A. The boat was in the water. Since I brought with me the boat builder and I wanted him to know and see the condition of the boat, too, so I had a crane there. There was two cranes.

Q. Speak slowly.

A. There are two cranes there, so I hired one of them [51] to pull up the boat so we could see the condition of the boat, because it's in the water and we cannot see everything. So they pull up the boat. And what the condition of the boat was, it was almost the same as the condition that it was an Hana, Maui, that all the bottom was gone.

Q. When the boat was picked up in the air with the aid of a crane, were any pictures taken?

A. Yes, sir, there was. I took a picture.

(Testimony of Delesforo Cadiente.)

Mr. Greenstein: Any objection to the pictures?

Mr. Waddoups: No.

Q. (By Mr. Greenstein): Is this picture a fair representation of what you saw?

A. Yes, sir.

Q. Just answer the question.

A. Yes, sir.

Q. This is the picture when you had the boat up with the crane, is that it?

A. Yes, sir.

Mr. Greenstein: I'd like to offer this in evidence, if the Court please.

Mr. Waddoups: No objection.

The Clerk: Libelant's Exhibit "E."

(The photograph referred to was received in evidence as Libelant's Exhibit "E.") [52]

By Mr. Greenstein:

Q. And was this also a picture taken on the same day? A. Yes, sir.

The Court: What day was that?

Q. What day was that? A. June 16th.

Mr. Greenstein: That is offered in evidence as the next exhibit.

Mr. Waddoups: No objection.

The Clerk: Libelant's Exhibit "F".

(The photograph referred to was received in evidence as Libelant's Exhibit "F".)

By Mr. Greenstein:

Q. And did you return to Molokai again to see the boat?

(Testimony of Delesforo Cadiente.)

A. I went June 25th. That's the last time I saw the boat.

Q. Before we get to June 25th, were these pictures also taken on the 16th of June?

A. Yes, sir.

Mr. Greenstein: I'd like to offer this in evidence, this photograph.

Mr. Waddoups: No objection.

The Clerk: Libelant's Exhibit "G".

(The photograph referred to was received in evidence as [53] Libelant's Exhibit "G":)

By Mr. Greenstein:

Q. Were any pictures taken on the 25th day of June at Kaunakakai? A. There was.

Q. There were some pictures taken?

A. Yes, there were some pictures taken on the 25th.

Q. Well, just answer the question whether these were the pictures that were taken and we will let Counsel see them.

A. Yes, sir, these are all the pictures taken on the 25th of June.

Mr. Greenstein: Any objection?

Mr. Waddoups: No.

Mr. Greenstein: We should like to offer into evidence these five photographs taken on the 25th day of June, 1949.

Mr. Waddoups: No objection.

The Clerk: "H-1, H-2, H-3, H-4, H-5".

(Testimony of Delesforo Cadiente.)

(The photographs referred to were received in evidence as Libelant's Exhibits "H-1, H-2, H-3, H-4, H-5".)

By Mr. Greenstein:

Q. When was the last time you saw the boat, Mr. Cadiente? A. December 2nd.

Q. Were any photographs taken on that day?

A. Yes, there was.

The Court: Tell me what exhibit this is. I'd like to have this Exhibit "E" explained as to what position that was taken from and what it shows.

Mr. Greenstein: I show you Libelant's Exhibit "E" and ask you to tell the Court how, first, the picture was taken?

The Court: Where from, from the top of the house?

Mr. Greenstein: What does it show, if you know?

The Witness: The top of where the man is standing shows the back of the boat, when it was hung up by the crane there. This is the whole bottom of the boat. That is where the keel and frame are.

The Court: Oh, so it is lifted high up enough so that you took it at this angle?

The Witness: Yes.

Mr. Greenstein: And pictures were taken on the "Miss Philippine," you say, in December?

The Witness: December 2nd.

Mr. Greenstein: And where was the "Miss Philippine" then?

(Testimony of Delesforo Cadiente.)

The Witness: Somebody's back yard at Kaunakakai.

Mr. Greenstein: I'd like to offer these into evidence, if the Court please.

Mr. Waddoups: Objected to, your Honor, on the grounds that it is too far remote from the injury, the damage complained [55] of. The evidence is that a great deal of damage was done to the vessel in progressing in the water and transporting her into somebody's back yard. That he mentioned. And further, that they had taken the engine out. And these pictures can give the Court no assistance whatever in determining the question of whether or not on June 6th when this boat ran into the ground she was salvagable within the meaning of the policy in question. I don't see how pictures taken December 6th or December 2nd can possibly help the Court in determining the issue. We submit that they are incompetent, irrelevant and immaterial.

Mr. Greenstein: If the Court please, we should like to contend that the condition of the boat is always material. The controlling factor is not necessary as to the immediate time of the running aground. If, for example, in connection with the tow the boat had gone under, that would be a total loss. I think this Court has a right to consider the condition as of the last date that is available to the Court, because whether or not either the assured or the insurer was correct in either abandoning or not abandoning, or in either going forward or not going for-

(Testimony of Delesforo Cadiente.)

ward in attempting to repair, can be translated in terms of what the final condition of the boat is. The fact that this boat is presently in somebody's back yard we maintain is very material to the original abandonment of the original owner of the boat, substantiates [56] his position all the way throughout. Here we have a boat that was abandoned as not being worthy of repair, and we finally find a boat in somebody's back yard just rotting away.

Mr. Waddoups: Well, if your Honor will look at the insurance policy and particularly to the sue and labor clause contained in the insurance policy, I think it will become obvious to the Court that the question of whether or not this claimant, the Libelant, is entitled to recover, is whether or not at the time it went aground that boat was in a position to be salvagable within the cost limits set forth in the policy, namely, $21,500. And there is also an obligation in that policy to sue and labor on behalf of the insurance company and himself to diminish damages. The cases are clear that that is the duty of the insurer.

Now, in determining whether or not the sue and labor cluase can be invoked in this case, your Honor, we have to fix the time when the question as to whether or not it was salvagable arose. And that was when he first got notice of the boat's condition, that it was aground. It is to that period of time that we must address ourselves in determining this case. And what some other people did with the boat in the course of the next six months would certainly not

(Testimony of Delesforo Cadiente.)

control his right to recover or not recover under this policy.

Mr. Greenstein: With reference to that, before your [58] Honor rules on that, I should like to point out that at the close of the case we expect to file a memorandum of authorities which is slightly at variance with the points contended by Mr. Waddoups. We maintain that either the party had a duty in whether—if this man thinks it cannot be repaired for a certain value, the best way the insurance company could prove that he was wrong is by going ahead to repair it and say we repaired it for less value than is set forth in the insurance.

We will also have some authorities with reference to the position of the insurance company once it takes control. And the United States Supreme Court has said in cases of this type that once the insurance company starts these operations and takes it from the control of the shipowner, they cannot give it back unless they give it back to him in repaired condition, which has not been done. That is very material, very material as to the present condition of that boat.

The Court: I can't see the materality of the last photographs offered.

Mr. Greenstein: May we note an exception, if the Court please? Would this be a convenient time for your Honor to recess?

The Court: Yes.

Mr. Greenstein: There is one more point. We are going [58] a little faster than I anticipated.

(Testimony of Delesforo Cadiente.)

My next witness will need an interpreter. I can't get him at 1:30, in which I thought I would. Is there any objection to going on tomorrow morning?

Mr. Waddoups: No, I have no objection. Mr. Gallagher, who will be one of the two witnesses we will call, will not return from the Island of Maui until this afternoon, and he will be available tomorrow morning.

The Court: Well, how many more witnesses are there?

Mr. Greenstein: Just one more.

The Court: When can you have him?

Mr. Greenstein: The first thing in the morning.

The Court: Well, this witness here, he will be under examination for some time?

Mr. Greenstein: Well, I have no quarrel with going forward. I wanted the Court to know now that my position is that I am almost through with this man and I cannot go forward with my next witness until I can get an interpreter. And I am informed that the district court can't let me have one until tomorrow morning. Do you think it is worthwhile to go ahead?

Mr. Waddoups: Well, I think we can complete it tomorrow.

Mr. Greenstein: We can complete the case tomorrow.

The Court: Well, all right, then, at your suggestion this is continued until 9:30 tomorrow morning. (The Court recessed at 11:38 a. m.) [59]

January 17, 1950

The Clerk: Admiralty No. 417, Fulgencia D. Cadiente vs. Indemnity Marine Assurance Co., for further trial.

Mr. Greenstein: I would like to offer into evidence at this time a letter in behalf of the Libelant, making demand for payment, a copy of the letter with a return receipt. We don't need that, I guess.

Mr. Waddoups: No objection.

Mr. Greenstein: And also the letter received in response.

Mr. Waddoups: In conection with the document last offered and to which we said there was no objection, it may be clear while we have no objection to the document's being admitted in evidence, we do not admit the truth of the statements contained in said document.

The Clerk: That will be Libelant's Exhibit I.

(Thereupon, the document above referred to was received in evidence as Libelant's Exhibit I.)

LIBELANT'S EXHIBIT I

June 14, 1949

The Indemnity Marine Assurance Company, Ltd.
c/o The Bonding and Insurance Agency, Ltd.
848 Fort Street
Honolulu, T. H.

Re: Policy No. 11 SFH 10562—
Sampan MISS PHILIPPINE

Gentlemen:

Demand is hereby made upon you to pay the sum of $10,500.00 in accordance with the terms of the above captioned marine insurance policy.

You are advised that said sampan, so insured, is a total loss due to stranding, within the meaning and coverage of said policy.

You are again notified that said total loss occurred on or about June 6, 1949, at or near Kaupo, Mana, Maui, and that said vessel has been abandoned by the assured.

Very truly yours,

HYMAN M. GREENSTEIN,
Attorney for assured
Fulgencia D. Cadiente

HMG:rp
registered mail, return receipt requested.

cc: Robertson, Castle & Anthony (Mr. Waddoups)

Admitted January 17, 1950.

Mr. Greenstein: And a letter received from Mr. Waddoups in response to my letter.

Mr. Waddoups: No objection.

The Clerk: Libelant's Exhibit J.

(Thereupon, the document above referred to was received in evidence as Libelant's Exhibit J.) [60]

LIBELANT'S EXHIBIT J

ROBERTSON, CASTLE & ANTHONY
Attorneys at Law

312 Castle & Cooke Building
Honolulu 1, Hawaii

June 17, 1949

Mr. Hyman M. Greenstein
Merchandise Mart Building
Honolulu, T. H.

Re: Policy No. 11 SFH 10562—
Sampan MISS PHILIPPINE

Dear Sir:

In response to your letter of June 14 addressed to Indemnity Marine Asurance Company, Ltd., we wish to advise you that liability under the policy is denied.

It is clear to us that this loss is not a constructive total loss. For your information, the vessel in ques-

tion is tied up, keel down, in a righted position, at the Kaunakakai pier, and its owner is still your client. Our client will not assume responsibility for the disposition of said craft.

Very truly yours,

THOMAS M. WADDOUPS.

TMW:GB

Admitted January 17, 1950.

Mr. Greenstein: I would also like to offer into evidence a release signed by the boat builder, who was the second party made payable under the loss payable clause of the insurance policy. This is also signed across the face of the policy.

The Court: Who is that?

Mr. Greenstein: Tanimura of the Kewalo Shipyards. There is a loss payable clause made both to the bank and boat builder, and we have had the bank testify as to the relinquishment of their rights.

Mr. Waddoups: No objection.

The Clerk: Libelant's Exhibit K.

The Court: All right.

(Thereupon, the document above referred to was received in evidence as Libelant's Exhibit K.)

Mr. Greenstein: Will you resume the stand, Mr. Cadiente.

DELESFORO B. CADIENTE

resumed the stand and testified further as follows:

The Court: Sit down.

(Direct Examination)

By Mr. Greenstein:

Q. Now, Mr. Cadiente, when was it that you went to Kaupo, Maui, to view the "Miss Philippine"?

A. June 7. [61]

Q. And whom did you go with?

A. I go with Mr. Hagood.

Q. Now, where was the "Miss Philippine"?

A. She was at the reef off Hana, Maui.

Q. How far was she from the shore, if you know?

A. Well, when I reach over in the afternoon, half of the body of the boat was flooded with water, that means right in the reef there.

Q. Were you able to go out to board the vessel?

A. Not that afternoon, sir.

Q. Did you at any time go aboard the "Miss Philippine"?

A. Yes, the next morning, that is Tuesday 8th—I mean, Wednesday, June 8.

Q. The following morning? A. yes, sir.

Q. Did you observe the condition of the "Miss Philippine" when you went aboard?

A. Yes, sir.

Q. Will you describe for the Court just what you

(Testimony of Delesforo B. Cadiente.)

saw and observed with respect to the condition of the vessel?

A. Between 6 and 7 when—June 8, that is Wednesday, I went aboard the boat, "Miss Philippine," and I observed the condition of the boat, that it was badly damaged.

Q. Can you describe just where it was damaged?

A. The bottom of the boat was completely wrecked [62] except a little bit left of the keel.

Mr. Waddoups: May I have that last, please?

(Answer read.)

Q. (By Mr. Greenstein): Now, you testified yesterday that you also saw the boat later at Molokai, later in the month. A. Yes, sir.

Q. And we introduced into evidence pictures of the bottom of the boat. A. Well——

Q. Let me ask you a question. Can you tell us about the condition of the bottom of the boat as compared to what you saw later at Molokai with respect to which we do have a photograph.

A. It was not much——

Mr. Waddoups: Object to that, your Honor, on the ground that the controlling time is the condition of the vessel before the salvage operation started.

The Court: It is overruled because it is simply asking whether it was the same at the later date as it was when he saw it at the beginning.

Mr. Waddoups: Very well.

(Testimony of Delesforo B. Cadiente.)

A. It was not much different when the first time at Kaunakakai, Molokai, sir. [63]

Q. (By Mr. Greenstein): When was it that you ordered the crew of the "Miss Philippine" to return to Honolulu?

A. About 12 o'clock noon of June 8.

Q. And why did you tell them to return to Honolulu?

A. Because after observing the condition of the boat, I have in mind to abandon the boat.

Q. And why was it that you abandoned the vessel then? A. Because——

Mr. Waddoups: Objected to as incompetent, irrelevant, and immaterial, your Honor, calling for a conclusion of this witness, who is not qualified as an expert.

The Court: Overruled.

Q. (By Mr. Greenstein): Why did you abandon the boat?

A. Because after observing the condition of the boat, it is hopeless for me to bring it to Honolulu any more where we can only get a shipyard to fix the boat, and I don't think we can bring the boat back to Honolulu.

Mr. Waddoups: Move to strike the last part of the answer: "I don't think," your Honor, because this man is not qualified as an expert.

The Court: He has given his reasons as to why he withdrew the crew and abandoned the boat.

(Testimony of Delesforo B. Cadiente.)

Q. (By Mr. Greenstein): Did you notify anybody of your abandoning of the boat?

A. Yes, sir, I 'phoned up the Coast Guard at Honolulu. [64]

Q. What did you instruct them to do?

A. I ask them to transfer the message to King, Limited, to tell them not to come to Hana any more because I am abandoning the boat.

Q. Did you make any communication of your abandonment to the insurance company?

A. I think that King, Limited, did, because when I reach over here the next day, I already receive a letter from Mr. Matthew.

The Court: Who is that? I don't get that.

Mr. Waddoups: Let the record show that is Matthew of the Bonding and Insurance Agency.

The Court: Agent for the insurance company?

Mr. Waddoups: Yes, your Honor, we admit that Mr. Matthew is an agent for the defendant.

The Court: And the testimony is that you notified him, or what?

The Witness: I never notified him, but after I come back from Molokai, I receive a letter from him to appear in his office.

The Court: Yes.

The Witness: To sign a note in front of him.

The Court: That is what day?

Mr. Greenstein: I am going to offer this into evidence, if the Court please. [65]

(Testimony of Delesforo B. Cadiente.)

Q. (By Mr. Greenstein): Is this the letter you later received from the insurance company?

A. Yes, sir, this is the one.

Mr. Greenstein: I would like to offer this letter, written by Mr. Matthew of the Bonding and Insurance Agency, the agent for the respondent insurance company.

Mr. Waddoups: No objection.

Mr. Greenstein: Your witness.

The Clerk: Libelant's Exhibit L.

(Thereupon, the document above referred to was received in evidence as Libelant's Exhibit L.)

(Testimony of Delesforo B. Cadiente.)

LIBELANT'S EXHIBIT L

The Bonding and Insurance Agency, Ltd.
General Agents—Territory of Hawaii

United States Fidelity and Guaranty Company
848 Fort Street
Honolulu 2, T. H.

June 9, 1949

Mr. Fulgencia D. Cadiente
P. O. Box 303
Ewa, Oahu, T. H.

Dear Sir:

Re.: Indemnity Marine Asurance Company, Ltd.
Policy No. 11 SFH 10562—Sampan "Miss Philippine"

You have advised that the above vessel stranded at or near Pauhana, Maui, on the morning of June 6, 1949.

We accordingly hereby make demand upon you to proceed with the salvaging of this vessel in accordance with conditions of the above policy.

Yours very truly,

THE BONDING AND INSURANCE AGENCY, LTD.

/s/ A. H. MATTHEW,
Office Manager.

AHM:h

Admitted January 17, 1950.

(Testimony of Delesforo B. Cadiente.)

Mr. Greenstein: Your witness, Mr. Waddoups.

The Court: Just a minute. Let me examine this. You received this letter when?

The Witness: After I come back from——

The Court: Yes, but when was that?

The Witness: Two days after I come back I receive it.

The Court: When did you come back?

The Witness: Wednesday afternoon.

The Court: What day of the month would that be?

The Witness: June 8.

The Court: June 8 you came back?

The Witness: Yes.

The Court: Back to Honolulu? [66]

The Witness: Yes.

The Court: And two days after that would be on the 10th you received this letter?

The Witness: Yes, two days.

The Court: All right. You may proceed.

Cross-Examination

By Mr. Waddoups:

Q. Referring to the letter in question, dated June 9 and bearing Libelant's Exhibit No. 1, was that delivered to you, or did it come to you through the mail? A. Through the mail.

Q. And was that at home when you got back from Maui? A. It was in the post office.

Q. You picked it up at your post-office box?

A Yes.

Q. And was that the day after you got back, or two days after, do you know?

(Testimony of Delesforo B. Cadiente.)

A. Two days after I got back.

Q. So you got back on Wednesday the 8th and you received that letter on the 10th; is that correct?

A. In the evening.

Q. What? A. In the afternoon, yes.

Q. Mr. Cadiente, you have another job besides managing your wife's boat, haven't you?

A. Yes, I do. [67]

Q. What do you do?

A. Special police of the plantation.

Q. And where are you a special police?

A. Ewa plantation.

Q. What plantation? A. Ewa plantation.

Q. Ewa. And is that a full-time job?

A Yes, sir.

Q. And you just help your wife out; she is the one who owns the boats, but you are her agent and take care of them; is that right?

A. That's right.

Q. And do you direct the operations of these boats? A. Yes, I do.

Q. Do you do any actual fishing yourself?

A. No, I don't do any actual fishing myself.

Q. You don't go out and run the boats yourself?

A. No.

Q. You leave that, in this case, up to Morton?

A. The skipper, yes.

Q. Do you hire the crew or does he hire?

A. Well, she hires.

Q You just pay the bills?

(Testimony of Delesforo B. Cadiente.)

A That's right.

Q. And make any profit you can out of the fish they [68] bring in; is that correct? A. Yes.

Q. So you don't hold yourself out as a seaman?

A. No.

Q. Mr. Cadiente, you have testified that you went over with Mr. Hagood. A. Yes.

Q So was that the first time you saw the vessel after it had grounded? A Yes, sir.

Q. And at that time did Mr. Hagood make an examination of the vessel?

A. No, sir, he never did.

Q. Did he just fly around it?

A. Just fly around it.

Q. Never came down? A. No.

Q. And as a result of your investigation did you direct him to start salvaging operations at one time?

A. No, I never did.

The Court: I understand now that he went over with Hagood.

Mr. Waddoups: That is where his testimony is a little confused, your Honor. I will try to develop that.

Q. (By Mr. Waddoups) Did you go with Hagood or did you [69] go by yourself?

A. No, he requested me—he requested me to come with him, that he wanted to come with me and see the boat.

Q. Had you approached King, Limited, to have the boat salvaged?

(Testimony of Delesforo B. Cadiente.)

A. No, I never make any agreement with them.

Q. How did it happen that Mr. Hagood got in touch with you, Mr. Cadiente?

A. This man that went with me — the Coast Guard, these men went and talked to Mr. Hagood and Mr. Hagood come to me and asked me, "Do you want to salvage your boat?" I told him, "I don't know what to say because I never see the condition of the boat."

Then he asked me, "Can you pay my fare so I go with you to Molokai?" So, "All right," because I was interested. So I bought his ticket, I bought my ticket, we went togeher.

Q. And that was on what day? The 7th?

A. June 7, yes.

Q. In the morning?

A. About noon, sir.

Q. And did you go down to where the boat was?

A. I went myself.

Q. And Mr. Hagood flew around?

A. Just flew around.

Q. And you testified. [70]

The Court: Wait a minute. I would like to have this a little clearer as we go along. He bought Mr. Hagood's ticket and they went together to Maui. How did they go?

Q. (By Mr. Waddoups) How did you go to Maui?

A. From the airport I rent another plane.

Q. From what airport?

(Testimony of Delesforo B. Cadiente.)

A. Maui airport.

The Court: How did you get to Maui together, by boat or plane?

The Witness: We went by the big plane, Inter-Island plane.

The Court: What?

The Witness: Inter-Island plane.

The Court: Hawiian Airlines?

The Witness: Yes, Hawaiian Airlines.

The Court: You went over to Maui and you landed in Maui where?

The Witness: At the airport there at Maui.

The Court: Yes, and then Mr. Hagood hired a plane there?

The Witness: By himself.

The Court: Small plane?

The Witness: Small plane.

The Court: Somebody else piloted it?

The Witness: Yes. [71]

The Court: You didn't go with him in the plane?

The Witness: No, sir. And I hired also another plane.

The Court: You what?

The Witness: I hired also another plane, only me and the driver.

Mr. Greenstein: I think he means an automobile.

The Court: Hagood went in one plane?

The Witness: Yes.

(Testimony of Delesforo B. Cadiente.)

The Court: You hired another plane?

The Witness: Yes.

The Court: You didn't go with Hagood, but you took another plane?

The Witness: I took another plane.

The Court: All right.

Q. (By Mr. Waddoups): On that day did you land at Kaupo? A Yes, I did.

Q. Did Hagood land at Kaupo?

A. Hagood landed at Kaupo. It is about two or three miles away from the boat, but when I landed in there, I take another taxi car to go to the boat, but Mr. Hagood after circling by the boat, he went back to the airport and come to Honolulu.

Q. So that Hagood never did get off the plane; is that [72] correct? A. No.

Q. At that time.

A. By the boat place, but he went down at the small airport at Hana, Maui, far from the boat side.

Q. What we are interested in, Mr. Cadiente, did Mr. Hagood ever inspect that boat on the 7th?

A. No, sir.

Q. From the shore? A. No, sir.

Q. His only inspection was from the air?

A. Yes.

Q. Is that correct? A. Yes.

Q. And you inspected it from the shore?

A. Yes, I did.

Q. You went aboard that vessel?

A. I went the next day.

(Testimony of Delesforo B. Cadiente.)

Q. And when you first saw her on the 7th, was she upright? A. You mean the boat?

Q. Yes.

A. Not exactly upright, but was sinking from the other side of the ocean.

Q. And did you go aboard? [73]

A. I never go in that afternoon. I only stay on the side.

Q. When did you go aboard the first time?

A. It was Wednesday in the morning.

Q. And did you examine the engine or not?

A. Yes, sir, I did.

Q. What was its condition?

A. It was plenty damaged.

Q. What do you mean 'plenty damaged'?

A. The boat below the engine all damaged and the water was slashing through the engine room.

Q. The engine was still intact, wasn't it?

A. Yes, hanging on a big stone.

Q. How about the cabin?

A. The cabin was all open sir.

Q. Was what?

A. The cabin all open and the water was slashing over the cabin.

Q. How about the flying bridge?

A. Damaged, too.

Q. What was damaged to the flying bridge?

A. Well, let's see, well it was dented in the proper position when the boat was in running condition.

(Testimony of Delesforo B. Cadiente.)

Q. Mr. Cadiente, I show you a picture which is marked on the back of it "6/12/49." I ask you to look at that [74] picture and tell us if you recognize what it represents.

A. Yes, this is the nose of the boat.

Q. And was the boat in that same condition, I mean from outward appearance, about the same as that when you saw her on Wednesday the 8th?

A. Yes, sir.

Q. Was she out of water in that manner?

A. Just the nose. Over here water, only this nose over here was on the land between the rocks, between stones.

Mr. Waddoups: We offer this in evidence.

Mr. Greenstein: No objection.

The Clerk: Respondent's Exhibit No. 1.

(Thereupon, the document above referred to was received in evidence as Respondent's Exhibit No. 1.)

Q. (By Mr. Waddoups): I show you another picture that is marked 6/9/49 and ask you to look at that and tell us if that shows an accurate representation of what you saw when you went over there.

A. Yes, sir, this is.

Mr. Greenstein: Pardon me. Is that marked 6/9 or 6/12?

Mr. Waddoups: 6/12, I am sorry. We offer this in evidence.

The Clerk: Respondent's Exhibit No. 2.

(Testimony of Delesforo B. Cadiente.)

(Thereupon, the document above referred to was received in evidence as Respondent's Exhibit No. 2.) [75]

Q. (By Mr. Waddoups): Did you go into the water and examine the hull from underneath?

A. You mean that morning when I went over there?

Q. The first time you examined that vessel on the 8th when you went aboard.

A. Yes, we did. With all the crew.

Q. You went around the vessel?

A. We did.

Q. Could you tell the Court how many planks were broken?

A. I cannot exactly tell you because it was splashing—I mean, the water it was not so clear that we could not get near only that we could see when the water pound the boat up, we could go down quite a way, but could hardly count how many plank.

Q. The ocean was pounding it up and down?

A. Yes.

Q. Is that correct? A. Yes.

Q. Were you ever there, Mr. Cadiente where—

Mr. Waddoups: Withdraw that question.

Q. (By Mr. Waddoups): Do you know a man by the name of Mr. Frank Gallagher?

A. I know.

Q. Of the American Shipping Board? [76]

A. Yes, I know.

(Testimony of Delesforo B. Cadiente.)

Q. Were you ever at the scene of that boat when Mr. Gallagher was present?

A. I was not there when he went.

Q. You were never there with Mr. Gallagher?

A. No, I never did.

Mr. Waddoups: I think that is all, your Honor.

Mr. Greenstein: No further questions.

(Witness excused.)

Mr. Greenstein: That is our case, your Honor.

Mr. Waddoups: At this time, if your Honor please, pursuant to the broad powers of equity which the Court sitting in admiralty has, we move at this time that the Court enter an involuntary nonsuit against the libelant. The rules of admiralty applicable in this court make no provision for this type of motion, your Honor. I have checked them quite carefully, but the cases are full of ample authority to the effect that the Court sitting in admiralty has broad equitable powers. Rule 41 (b) of the Civil Rules of Procedure, Federal rules of procedure, provides that in civil cases of law and equity the Court may, where a case has not been made out at the end of the plintiff's case, on motion grant a dismissal. We base this motion, your Honor, on the fact that libelant has utterly failed to comply with the allegations of his complaint. There is absolutely no evidence before your [77] Honor as to (a) the extent of the damage from a monetary point of view and (b) the amount it would cost, or would have cost, to repair that vessel.

(Argument on motion by Counsel, both for the Libelant and Respondent.)

The Court: I don't care for any further argument. The motion is denied.

Mr. Waddoups: If your Honor please, may we have a short recess at this time.

The Court: Yes.

(Recess had.)

Mr. Waddoups: If your Honor please, at this time, as it was indicated to the Court in chambers, we are having a little difficulty in getting attendance of one of our witnesses and request the matter stand over until 10 o'clock tomorrow morning.

Mr. Greenstein: No objection.

The Court: That is agreeable to the Court.

Mr. Greenstein: No objection.

The Court: All right, the matter will stand over then until 10 o'clock tomorrow morning for further proceedings.

(Thereupon, at 10:45 a. m., an adjournment was taken until 10:00 a. m., January 18, 1950.)

January 18, 1950

(The Court convened at 10:00 a. m.)

The Clerk: Admiralty No. 417, Fulgencia D. Cadiente, Libelant, versus The Indemnity Marine Assurance Company, Limited, Respondent, for further trial.

Mr. Waddoups: We are ready to proceed, your Honor. Mr. Gallagher, will you take the witness stand, please?

FRANK HOWARD GALLAGHER

a witness in behalf of the Respondent, being duly sworn, testified as follows:

Direct Examination

By Mr. Waddoups:

Q. Will you state your name, please?

A. Beg pardon?

Q. What is your name, please?

A. Frank Howard Gallagher.

Q. Mr. Gallagher, by whom are you employed?

A. American Bureau of Shipping.

Q. And in what capacity?

A. Marine surveyor.

Q. Does that bureau have an office here in the Territory? A. Yes. [79]

Q. Where is your office?

A. In the Hawaiian Trust Building.

Q. Will you please tell the Court the nature of the organization of the American Bureau of Shipping and what are its functions?

A. American Bureau of Shipping, it is a classification society primarily. However, here in Honolulu in addition to doing classification work I represent Lloyds, London salvage, United States salvage, and any other foreign classification societies.

Q. Does the American Bureau of Shipping have any governmental connection?

A. As far as insurance is concerned, no. We are, however, licensed by the Department of Commerce

(Testimony of Frank Howard Gallagher.)

through the Treasury Department for the assignment of load lines of vessels.

Q. How long have you been a surveyor, Mr. Gallagher?

A. I have been with the American Bureau for nine years.

Q. And prior to that, what experience, if any, did you have in and about ships?

A. I was on a guarantee staff of the Sun Shipyard in Chester, Pennsylvania. I was also at the Sparrow's Point Bethlehem Shipyard. And prior to that I had ten years' experience at sea.

Q. Do you hold any licenses as a master? [80]

A. I have a chief engineer's license for both steam and diesel, unlimited. I have a professional engineer's license in the nature of naval architect for the State of Washington and the State of Oregon.

Q. And have you studied the matter, the various factors involved in the work as a surveyor?

A. Quite diligently, I believe.

Q. Did you go to school to study that?

A. In this particular case, yes and no. In other words, to get your degree as a naval architect I did not attend Webb or M.I.T. or Michigan. Those are the three leading schools. However, my training had been sufficient, my education has been such that I had passed the examination for both the State of Oregon and the Sate of Washington.

Q. Mr. Gallagher, on or about June 6th or 7th of

(Testimony of Frank Howard Gallagher.)

this year were your services engaged by the Bonding and Insurance Agency in connection with the stranding of a vessel known as the "Miss Philippine"?

A. That is correct.

Q. And what were you employed to do?

A. I believe, having made a rough reviewal of my report here, I was advised by Bonding and Insurance on the 7th of June to attend the site of the stranded "Miss Philippine" sampan on the coast of Maui. I left Honolulu after having been authorized by them to attend and hold a survey; [81] arrived at the scene of the wreck at approximately six, between six and seven in the evening.

Q. Mr. Gallagher, did you make a written report covering your doings in connection with the "Miss Philippine"?

A. Quite in detail.

Q. Do you have that report there?

A. I have it here.

Q. Would it assist you in refreshing your memory to refer to it?

A. Well, as far as the questions are concerned, yes.

Mr. Waddoups: Do you have any objection to him referring to his report?

Mr. Greenstein: I have no objections. I may want to inspect the report. Do you have a copy?

(Mr. Waddoups hands a document to Mr. Greenstein.)

(Testimony of Frank Howard Gallagher.)

By Mr. Waddoups:

Q. After arriving at the scene, what did you do, at the scene of the vessel?

A. At the time that I arrived at the scene of the vessel she was lying beam to or broadside to the beach.

The Court: What time?

The Witness: At approximately 6:45 p. m., June 7th. If I may be permitted, I think that—is it quite all right to read the report? It is quite short. As far as my particular attendance, the report at that time—— [82]

Mr. Waddoups: Do you have any objection?

Mr. Greenstein: Let him continue. I will move to strike if he is going beyond the scope——

——Mr. Waddoups: Answer it in your own way and Counsel will make such corrections later.

A. (Continuing) Well, the vessel was lying in an approximately easterly-westerly direction, I believe, and it was quite well-beached inasmuch as that with the receding tide the whole underwater portion of the vessel was completely exposed. The condition of the bottom I noted in detail, and that condition is reflected in this report. The condition was such that in my opinion the vessel was completely salvagable.

Mr. Greenstein: That is objected to, if the Court please, as going beyond the scope of any question.

The Court: Yes. You are giving your conclusions there when you were merely asked as to the condition of the vessel.

(Testimony of Frank Howard Gallagher.)

Mr. Waddoups: That is probably my fault, your Honor.

Q. (By Mr. Waddoups): What did you find was the condition of the vessel? You may refer to your report to refresh your memory.

A. The condition at that time on the starboard side, which is the land side, I found the planking with a hole through in the engine compartment, and the area of such hole was approximately three by three, or nine square feet. [83] The planking in the way of the fish compartments, which were aft of the engine comparment, intact but sustaining damage due to the constant rocking of the vessel by the wave action.

On the port side, the opposite side to the position to the shore, the planking in the way of the engine compartment and fish wells, sustaining damage due to constant rocking of vessel by wave motion.

Q. What was the condition of the keel?

A. The keel torn but intact as members, intact as a member.

Q. What do you mean "intact as a member"?

A. The construction of that keel extending inwardly, where your planking makes up to the keel, we have what is known as a rabbit line, and as far as the intactness of that member known as keel it was intact as a keel. However, it was scuffing due to it being lodged in between rocks.

Q. Did you examine any other portion of the vessel?

(Testimony of Frank Howard Gallagher.)

A. Yes, I did.

Q. And what did you find to be its condition?

A. I found the rudder was broken away and the propeller was badly damaged.

Q. Was the propeller still attached?

A. The propeller and shaft was still attached but badly damaged; the stem intact with the exception of the [85] part having sustained damage as the result of constant racking.

Q. What do you mean by racking, Mr. Gallagher?

A. Racking, the motion of the vessel, the physical effect upon the structure of the vessel from the result of motion.

Q. And that motion was caused by what?

A. By the waves, the wave motion.

Q. Did you examine any other portion of the vessel?

A. There was no need to because in my opinion I was there purely to carry out survey and what I did note was the apparent damage.

Q. Did you notice, did you observe the flying bridge and the deck and the upper portion?

A. There was no damage at the time that I attended that vessel above the chines.

Q. And what are the chines?

A. The chines are the angular chines from your side planking leading down to the keel. In other words, the right-angle section of the bottom planking and the side planking.

(Testimony of Frank Howard Gallagher.)

Q. From your experience and background, Mr. Gallagher, did you form an opinion as to the salvagability of that vessel at that time?

A. Yes, I did. [85]

Q. And what was that opinion?

A. My opinion was that the vessel should be immediately salvaged. I base that opinion—if I am permitted I'd like to read my third paragraph—

The Court: Well, perhaps you had better wait until you are asked about that, what you based it on.

A. The vessel was salvagable, in my opinion, due to its position on the shore. The vessel in stranding eased itself up by its own buoyancy and with the receding tide was left lodged in between the rocks. The rocks which I observed at the time were of such nature that they could be moved in order to get the vessel seaward. That was later borne out.

Q. Who was with you, if anyone, at the time you were making this inspection?

A. I attended the vessel alone.

Q. Did you see Mr. Cadiente that day, the first day?

A. I saw no one at Kaupo.

Q. Did you see the vessel later?

A. I saw the vessel on Saturday of that week.

Q. And was anyone with you at that time?

A. Yes, there were many people around the vessel at that time.

Q. Was Mr. Cadiente there?

(Testimony of Frank Howard Gallagher.)

A. Mr. Cadiente, to the best of my knowledge I never [86] saw him at the attendance of the wreck.

Q. And on the second occasion when you attended the vessel, what was done?

A. At the time that I made my second attendance, which was on that Saturday, the "Maizie C" was lying offshore and they were endeavoring to attach a line around the "Miss Philippine" and pull her off.

Q. Did they pull her off?

A. The vessel was pulled off at approximately 2:30 p. m. the following day, which was Sunday.

Q. And did they use any, did they have any mechanical equipment there to assist in dislodging it?

A. Yes, going back to my previous statement about the boulders, I found it was necessary to resort to some mechanical means. Therefore, I engaged a 14-ton tractor from the Kaupo Baldwin Ranch, which was of great assistance in clearing a pathway to get that vessel to sea.

Q. Now, did you observe the condition of the hull of that vessel and the keel on this second occasion, the Saturday when you went on your trip?

A. Yes, that's right, I did. In order to get that vessel out we had to remove the boulders, the small rocks, and so forth, lodged around the keel. As a matter of fact, the only difficulties we experienced was the lodging of rocks around the keel and towards the escape aft. [87]

(Testimony of Frank Howard Gallagher.)

Q. Was the damage at that time greater or less or the same as when you had seen the vessel—

A. There was more damage naturally. I had also calculated that we had—and I later checked into the weather conditions, and they were found to be practically the same from Monday until Saurday—and I found that with the increase of the tide that that vessel would approach the beach a little more. Now, there was about, in my opinion, due to what I will call 600 motions of rack in one day due to the weather conditions, the normal surge of the sea, pushing this vessel 600 motions a day. Those 600 motions from the time of my attendance, which was on Tuesday until Saturday, multiplied by the days, actually increased the damage I would say about 20 percent. The damage, however, was not so much in the nature of complete stoving in but it was the effect of the friction, the rolling of the vessel on to the rocks.

Q. And from your experience, Mr. Gallagher, on the second day of your attendance was that craft salvagable?

A. Yes, sir, it was. You mean on Sunday?

Q. Yes.

A. That would be my third day.

Q. Your third day. Was it salvagable at the time of pulling it off? A. Yes.

Q. Did you then see the vessel at a later time?

A. I saw the vessel when it was in a capsized condition at Kaunakakai, moored to the Territorial wharf.

(Testimony of Frank Howard Gallagher.)

Q. And was anything done in your presence to right the vessel?

A. I recommended to Mr. Chipchase, who was with me, that the vessel be rotated in the water and brought to an upright position, which was carried out.

Q. And did you observe the condition of the vessel after it had been righted?

A. Yes, there was no damage to the housing structure, of the deck, or to a good portion of the shell.

Q. In your opinion, Mr. Gallagher, in its condition as it was found at Kaunakaki in the righted position, would the cost of repairing or salvage of that vessel exceed twenty-one thousand dollars?

A. The cost, it would be rather from a business——

Mr. Greenstein: Objection to this. This man has not been qualified to testify as the the cost of building vessels or repairing. It is further objected to on the ground that in view of the state of the case in this stage that question is immaterial.

Mr. Waddoups: They have introduced the insurance policy in evidence, your Honor. It is part of their complaint.

The Court: Well, as to the qualifications of the witness as to the cost of construction and repair, you'd have [90] to qualify him.

Mr. Waddoups: Very well, your Honor.

Q. Mr. Gallagher, have you had any experience

(Testimony of Frank Howard Gallagher.)

in connection with your surveying with the cost of salvage?

A. Many, many times.

Q. And on various types of vessels?

A. Many, many jobs.

Q. And over how many years have you been doing it?

A. As far as the occasion of cost is concerned, I would say five years.

Q. And is it a part of your duty as a surveyor to make estimates as to cost of salvage?

A. Not only do I make the estimates but I draw up contracts and engage parties on tender bids to carry out such repairs.

Q. Have you had experience in the cost of repairs to vessels of the type of "Miss Philippine"?

A. Yes, I have.

Q. Are you familiar with the general run of costs in repairing vessels in this Territory?

A. I do that work quite frequently.

Q. Have you any opinion as to whether or not it would have cost more than twenty-one thousand dollars to repair the "Miss Philippine", considering her condition as she laid tied keel down at the dock at Kaunakakai? [90]

Mr. Greenstein: That is objected to on the ground of being highly leading and suggesting a figure to the witness.

Mr. Waddoups: I asked him if he has an opinion.

Mr. Greenstein: Well, I still object to it as being—it is putting words and figures in the wit-

(Testimony of Frank Howard Gallagher.)

ness' mouth. If this man is such a good expert on cost and repairs, let him be asked how much it would cost, not does he think it would cost more than twenty-one thousand dollars, more or less.

The Witness: That's quite all right. Is it all right to answer, your Honor?

Mr. Waddoups: The policy provides that it will not be a total loss unless it costs over twenty-one thousand dollars in repairs. The policy provides for payment only in the event of a constructive total loss. We submit it is a proper question.

The Court: You may, if you made an estimate, as estimates are made of the matter of cost of repair of the boat, you may testify. I don't want just your guess whether it would be more or less than twenty-one thousand dollars, or any other figure. But if you made an estimate, give us your estimate.

A. I did not make an estimate of the damage to the hull or the machinery, for the reason that I was not asked to do so. I was asked to state whether or not that vessel could be salvaged. If I were asked how much would it cost [91] offhand to effect repairs as I saw the vessel in Kamakakai——

Mr. Greenstein: I object to the rest of it as not being responsive to the question. The witness has already disqualified himself. He has already admitted that he did not make an estimate in the manner that is customarily made in the matter of making customary repairs that would be required. Salvagability is one thing. That is a nebulous con-

(Testimony of Frank Howard Gallagher.)

cept, that nobody worries about the ultimate expense. The man here has testified that he did not make a detailed estimate, so I submit that he is not qualified to give a specific figure.

The Court: Well, I don't know what the objection was.

Mr. Greenstein: Well, the specific objection is that he is not responding to the question. You asked him whether or not he made a detailed estimate, and he said no but if I would have I would have made so and so.

The Court: He hasn't finished his statement.

Mr. Waddoups: What were you going to say, Mr. Gallagher?

The Court: Were you going to say something in response to the question?

The Witness: I was, your Honor. At the time the vessel was at Kaunakakai when I saw it, as far as the hull is concerned, the engine, and the damage to the fish compartments, I would venture to say that the repairs could be effected for about seven thousand dollars.

The Court: Where? [92]

The Witness: At Honolulu.

Q. (By Mr. Waddoups): Have you any estimate as to the amount that the cost of towing it to Honolulu from Kaupo would be? A. Yes.

Q. What would you place that estimate at?

(Testimony of Frank Howard Gallagher.)

A. From Kaupo to Honolulu?

Q. From Kaupo. A. Kaupo?

Q. Kaupo to Honolulu, yes.

A. At the prevailing towing rate of fifty dollars per hour, why, I would say that that vessel could be towed in for perhaps about seven hundred dollars.

Q. Mr. Gallagher, what do you mean when you use the word "salvagable?" What is that word taken to mean in the language of surveyors like yourself?

A. That word, the interpretation of it means that in my opinion the vessel has a sufficient value that it has further use through repair.

Q. Mr. Gallagher, while you were over there, did you take any pictures?

A. I took some still shots as well as a 50-foot reel of 16 mm.

Q. Do you have that 50-foot reel with you here?

A. I do. Yes, I have. [93]

Mr. Waddoups: If your Honor please, may we show it to the Court, these movies that were taken over at Kaupo at the scene of this wreck? If the Court is interested in them, we'd like to present them. I feel they will graphically show what the situation was at that time.

The Court: When were they taken?

The Witness: These pictures were taken on the very same day, within a matter of three hours before the vessel was taken through the water on Sunday of that week.

(Testimony of Frank Howard Gallagher.)

The Court: Well, all they would show — we have got pictures in here of the vessel on the beach there at the extreme low tide apparently, and all that the movies would show is the rocking of the boat in response to the waves as they came over? What was the condition of the tide at the time the pictures were taken?

The Witness: I was just about full, and, if I am correct, I believe the tide started to ebb about 2:00 p. m. that day. I might mention that these pictures are far better than the still shots, as far as bringing out the condition of the vessel.

The Court: Well, have you got your apparatus here?

Mr. Waddoups: Yes, your Honor.

The Court: How long will it take?

The Witness: Three minutes.

The Court: Well, I mean to rig up. [94]

The Witness: Perhaps about two minutes.

Mr. Waddoups: May I suggest a brief recess while we rig it up?

The Court: All right.

(A short recess was taken at 10:30 a. m.)

(Movie shown of the "Miss Philippine")

Mr. Waddoups: If your Honor please, Counsel states he has no objection to the picture, this picture, which I would like to introduce in evidence as Respondent's next exhibit in order.

The Clerk: Respondent's Exhibit No. 3.

(Testimony of Frank Howard Gallagher.)

(The photograph referred to was received in evidence as Respondent's Exhibit No. 3.)

By Mr. Waddoups:

Q. Mr. Gallagher, during the course of your making a survey on the "Miss Philippine" did you have occasion to have any conversation with Mr. Cadiente who sits here?

A. The only time I ever saw Mr. Cadiente before this morning was at the Coast Guard office, I believe, during that week between the 7th and Sunday, whatever that date may be, and I saw him one time on the street in Honolulu. That's all.

Q. As surveyor for the Bonding and Insurance Company and for the defendant corporation in this action, the respondent [95] corporation, were you ever given any notice by Mr. Cadiente of intention to abandon—

Mr. Greenstein: That is objected to, if the Court please. It hasn't been shown that he would be the party to receive the notice anyway.

Mr. Waddoups: It shows that he went there as an agent of the corporation.

Mr. Greenstein: I will admit that.

The Court: I think that should be sustained. I don't know, I can't see that there would be any occasion for him. He is a surveyor.

Mr. Waddoups: Very well. You may cross- examine.

(Testimony of Frank Howard Gallagher.)

Cross-Examination

By Mr. Greenstein:

Q. Mr. Gallagher, you are familiar with the Hawaiian waters, I take it, the waters around the islands?

A. What do you mean by familiar with them?

Q. Are you familiar with the waters? Aren't you able to answer that question?

A. I would be familiar with waters only after I had consulted a chart.

Q. How long have you been out in Honolulu?

A. I have been in Honolulu one year.

Q. And do I take it, then, you are not familiar with the waters between Honolulu and Kaupo? [96]

A. As far as depths are concerned, no. I believe that anyone would always refer to a chart.

Q. Well, now, when you said that in your opinion the boat was salvagable at Kaupo, I take it that your opinion envisioned the towing of the boat to Honolulu, did it not?

A. That is correct.

Q. So that one of the factors could well be the waters in the route which would obtain between Kaupo and Honolulu?

A. In my opinion the vessel was considered satisfactory for the tow to the Port of Honolulu.

Q. Now, are you familiar with the route that was actually taken?

A. I am not familiar, no, I am not familiar with it, no.

(Testimony of Frank Howard Gallagher.)

Q. Well, you know it left Kaupo? You were there when the boat was floated?

A. Yes, I was.

Q. And you saw the boat when it was tied up at Kaunakakai? A. That is correct.

Q. So the boat—— A. That is right.

Q. ——there is a red mark here (Referring to map) A. That is right.

Q. Now, I ask you whether you are familiar with the [97] nature of the waters along the route indicated here by my pencil from Kaupo to Kaunakakai, that is, from the standpoint of whether the waters are rough or smooth, generally speaking?

A. If you would ask me——no.

Q. You are not familiar with that?

A. That is right.

Q. Isn't that a factor to be considered in connection with whether or not you think a boat could be towed from Kaupo to Honolulu, the nature of the waters to be covered?

A. The engagement of the salvager, King Freight, Incorporated, that was their responsibility to deliver that vessel to Honolulu.

Q. Yes. And they didn't go to Honolulu, did they?

A. For reasons perhaps which are none of my concern the vessel did not arrive in Honolulu.

Q. Now, in making your opinion and conclusion that the boat could be towed from Kaupo to Honolulu, did you consider the contingency that the boat might capsize?

(Testimony of Frank Howard Gallagher.)

A. I was interested in extracting the vessel from its location.

Q. That's correct. Now, did you consider the possibility that the boat would capsize in the water as it was going along?

A. That is the responsibility of the salvor in every case. [98]

Q. Are you having difficulty in answering my questions directly, Mr. Gallagher?

A. No, I am not, Mr. Greenstein. I am simply applying my position in the matter. I was engaged as an extractor.

Q. Yes, you were engaged by the Respondent here and you have been able to answer the questions on direct very nicely. Now, I am asking you and you had three times stated at three different locations here that the boat was salvagable. I am asking you that when you made up your mind whether you considered, as an expert, the possibility of the boat being capsized as it was in the process of being towed? Now, did you consider that factor or not?

A. The condition of the vessel, in my opinion, was such that stability would have been maintained.

Q. Well, now you are an expert in marine matters. You are familiar with the term "capsize". You are familiar with the term "towing bottom side up."

A. That's right.

Q. I ask you the third time whether you considered that factor at all, that possibility, yes or no?

A. I had faith in the concern doing the towing to

(Testimony of Frank Howard Gallagher)

consider such a condition. At the time they carried out what I thought was quite normal precautions. They installed flotation bags. It was quite understandable why the vessel should have a port list, as indicated in the film you have [99] just witnessed.

Q. You are going beyond my question. Do you mind just trying to answer my questions? I take it you did not then consider the possibility of the boat capsizing in water along the tow.

A. That was—what I am trying to state.

Q. I take it you cannot answer that question yes or no, then?

A. It is faith in other people that I had.

Q. We will move on to the next point, then, which makes a difference in your opinion as to whether or not that boat could be towed to Honolulu, the fact that the boat turned over. Would that make a difference?

A. Why the vessel turned over, I do not know.

Q. I didn't ask you why. I say, does that factor make a difference; towing the boat upright is one thing and bottom side up is another, is it not?

A. I should think that the effects of such a capsized tow of the vessel would be quite serious, yes indeed.

Q. Would it change the speed?

A. Considerably so, yes.

Q. Would it increase the hazards of completely effectuating the tow with the respect to the towing vessel?

(Testimony of Frank Howard Gallagher)

A. Would you repeat that, please?

Q. I will withdraw that and reframe it. Does it increase the possibility of the vessel being towed breaking up in water?

A. What do you mean by the vessel?

Q. Well, now, you are the expert. Let's leave that question alone. You were sent out there to survey the vessel, the "Miss Philippine." You are concerned with the salvagability of that vessel. When I am talking about the vessel, I am talking about the "Miss Philippine". Now, you say that could be towed from Kaupo to Honolulu?

A. That's right.

Q. Now, Honolulu is the place this vessel is to be towed?

A. That's right.

Q. Because that's where the repair facilities are?

A. Correct.

Q. When you examined her, she looked pretty good?

A. That's correct.

Q. When she was brought afloat, you do know that she turned over?

A. That's right.

Q. And I put it to you, whether or not that factor of the vessel capsizing would make a difference in the possibility of it being possible to tow the boat to Honolulu?

A. The condition of the bottom was not changed due to the capsized position of tow. [101]

(Testimony of Frank Howard Gallagher)

Q. Would you mind trying to answer a question directly? A. The housing——

Q. No, no, no. Just a minute, now. You are an expert in marine matters. The problem is to get the "Miss Philippine" to Honolulu. Right?

A. That is correct.

Q. I put it to you, that the fact that the boat capsized is a factor to be considered. Right? Yes or no? A. Yes, of course.

Q. Because in the first place it will slow the vessel down, slow the boat? A. Yes, naturally.

Q. And if the vessel breaks up, there is a hazard to the towing vessel. Right?

A. Not necessarily.

Q. Not necessarily? That is not a hazard?

A. Not necessarily.

Q. Now, I take it you don't know the character of the waters between Molokai and Oahu?

A. Well, I fished in those waters and that was the only extent.

Q. And you are an expert out here on——

A. On the application——

Q. ——in the Territory of Hawaii, and you don't know that it is public knowledge that the regions between Molokai [102] and Oahu are very rough as compared to this route? Can you tell us that you do not know that?

A. Those waters between Oahu and Molokai are known to be quite rough.

Q. Yes, they are. Well, that is admitted, because the Court knows it anyway. Now, considering the

(Testimony of Frank Howard Gallagher)

route between Kaupo and Honolulu, I ask you again whether it would make any difference in the ultimate objective to bring the "Miss Philippine" to Honolulu: One, the state of the condition of the "Miss Philippine" being capsized, in a capsized condition, and the rougher water between Molokai and Honolulu?

A. May I make this clear, Mr. Greenstein? My position—I was engaged solely to extract the vessel. That's all.

Q. Yes, and in the process of extracting it was your recommendation and your opinion of salvagability which projected the attempt to remove the vessel from Kaupo to Honolulu. That was your recommendation, was it not?

A. That is correct.

Q. And do you mean to say you did not consider the relative roughness of the waters in making that recommendation?

A. I know of many, many cases where vessels have been towed from Alaskan waters, having been up there.

Q. My question was, did you consider that or not? [103]

A. That is entirely the responsibility of the salvor.

Q. I take it you didn't then. Now, why is it that you can't answer—let me ask this question again—in your opinion now, as an expert, knowing the condition of the boat as you now know it, do you

(Testimony of Frank Howard Gallagher)

have an opinion as to whether or not that boat could actually cross the Molokai straits?

A. Oh, yes, I think it could.

Q. In tow? A. Yes.

Q. But it wasn't towed across there, was it?

A. It was not towed across, that is correct.

Q. And when you are talking about salvagability of the "Miss Philippine," you are talking about repairing it after you get to Honolulu—right?

A. The reason that Honolulu was thought of was because repairs can be effected a lot cheaper here than they can in the other islands.

Q. And let's go back now to the scene of the wreck. A shipowner has a right to consider where that boat has to go in order to effectuate the repairs, has he not? That is a factor? He also has the right to consider the question of the boat being on the beach and being racked, as you testified. That is a factor?

A. As far as he is concerned, yes.

Q. And if the boat is to be towed to Honolulu, there [104] is a time factor of bringing a tug out and then the flotation movement. Those are all factors to be considered? A. Yes.

Q. Now, when you said the boat was being racked 600 times a day, you weren't watching it, clocking the boat, were you?

A. I ascertained such movement by practical timing, yes.

Q. Do you know how many seconds there are in a day?

(Testimony of Frank Howard Gallagher)

A. There's 1440 minutes in a day. Multiplied by 60 will be the seconds.

Q. And are you trying to tell me the racking was less than one a minute?

A. The racking was less than one a minute.

Q. Yes.

A. At that time, yes, because there's many, many portions of coastline where you can have a vessel practically up to the edge of the water and you will have no racking.

Q. Was this a continuous film when we saw the racking?

A. This film was taken at one time.

Q. At one time? A. That is correct.

Q. The racking that shows there, there were several racking motions per minute, which would enlarge the number of rackings that you have testified about. [105]

A. I doubt that, Mr. Greenstein.

Q. Well, let's leave it alone. Of course, the winds could be stronger, too?

A. That is correct.

Q. Now, actually that boat until it is taken off the rocks is at the mercy of the elements—right?

A. Definitely so.

Q. The mercy of the winds, the racking and the stones? A. Absolutely.

Q. Now, as a surveyor, for example, you could have recommended that the boat merely be picked up and retained on shore, could you not?

A. Perhaps that could have been carried out.

(Testimony of Frank Howard Gallagher)

However, there was quite an incline. And then, of course, at that remote location facilities were very minimum.

Q. So actually the practical solution was to have the removal of the boat to Honolulu? A. Yes.

Mr. Greenstein: Thank you. No further questions.

The ourt: Where were you when the boat turned turtle?

The Witness: I imagine I was back in Honolulu.

The Court: You weren't there?

The Witness: No, sir. I left the scene at the conclusion of that picture when she was drawn to sea. I had to get a certain plane that night, the last plane, as a matter [106] of fact, six o'clock.

The Court: Well, she was under way and in tow when you left?

The Witness: That is right.

The Court: Where were you when the air bags were put in?

The Witness: I was at the scene.

The Court: Now, you mentioned two or three times "we did this," so and so, indicating to my mind that you were participating in the removal of the boat from the beach.

The Witness: My appliance of the term "we" had reference to the fact that I engaged a tractor and I believe also ten men to assist the men that you saw working around the vessel.

The Court: Did you take a hand by directions

(Testimony of Frank Howard Gallagher)

and instructions and suggestions in the placing of these air bags in the boat and securing them?

The Witness: I was consulted about where the bags were placed.

The Court: How much does that vessel draw normally when she is at sea?

The Witness: I would say normally that the "Miss Philippine" would probably draw about five meet of water.

The Court: About five feet? And from the deck to her keel what is the depth? [107]

The Witness: No measurements were taken, but I would say her depth would be about seven.

The Court: Well, you mean that when she is at sea that her deck is only two feet above water, above the water line?

The Witness: If she was iced up and full, water aboard, and so forth, I would say that her extreme draft would be somewhat in the vicinity of five feet, considering the speed of that vessel was quite speedy, too.

The Court: The superstructure on her, what did it consist of?

The Witness: Actually, your Honor, there is no superstructure on that particular type of construction. She has purely a deck house. The deck house inward from the bulwark consisted of the usual sampan arrangements such as sleeping accommodations, master, pilot's, and also above that, why, she had a canvas-covered open bridge.

The Court: Where were the fish boxes?

(Testimony of Frank Howard Gallagher)

The Witness: Aft of the deck house.

The Court: Below deck?

The Witness: That's correct.

The Court: Where was the engine located?

The Witness: Below the deck house.

The Court: About how far?

The Witness: Midship of the vessel.

The Court: What was the length of the boat? [108]

The Witness: I do not believe I have those dimensions here. I may have.

The Court: Do you have the beam?

The Witness: No, those dimensions are not in my report.

The Court: Now, you saw the boat over in Maui. I mean at Molokai.

The Witness: Kaunakakai, yes, sir.

The Court: How many days later was that?

The Witness: I attended the "Miss Philippine" at Kaunakakai on June 14th, which was a week later.

The Court: She had been righted then?

The Witness: No, sir, she was not. She was in a capsized condition when I saw her at the Territorial wharf.

The Court: You didn't see her after she had been righted?

The Witness: Yes, I did, sir. I was the one that recommended the vessel be rotated and righted and left in an upright position.

The Court: Would it have been practically

(Testimony of Frank Howard Gallagher)

feasible to have righted her at sea, in your opinion?

The Witness: That, of course—well, let's put it like this: with the equipment that was towing the "Miss Philippine" I seriously doubt if they could right that vessel at sea.

The Court: Well, in the absence of a large vessel with [109] an overreaching boom you couldn't have done it with any other equipment, could you? Do you suppose that if there would have been two tugs the size of the "Maizie C" there——

The Witness: In the event that there was two tugs, why, I believe that rotation could have been accomplished because it was rotated in the matter of a very few minutes at Kaunakakai.

The Court: Well, that is perfectly still water.

The Witness: That is right, yes, sir.

The Court: In the lee of any wind.

The Witness: That's right.

The Court: Have you got any questions?

Mr. Waddoups: I have one or two more questions, your Honor.

Redirect Examination

By Mr. Waddoups:

Q. Mr. Gallagher, in the process of rotating this vessel at Kaunakakai, what equipment was used?

A. I believe we used a 2-inch manila line, and that line was wrapped around the girth of the vessel. The C.P.C. crane on the wharf was brought to the "Miss Philippine." The boom extended, the hook dropped, and the manila line wrapped around the

(Testimony of Frank Howard Gallagher)

vessel. It was made into a bit, hooked into the hook and the boom slowly rotated her into the upright position. [110]

Q. Was any damage done to her hull in the process of doing that? A. No.

Q. Nothing biting into the hull at any point, was there? Merely rope around it?

A. No. That's one reason we used the manila. We did not use a wire.

Q. In your opinion, was it practically feasible to make repairs to the "Miss Philippine" at Kaunakakai and then bring her to Honolulu for further repairs?

A. Well, I believe that, what we call salvage patches, could have been installed to the bottom of the "Miss Philippine" and the vessel pumped out, and as an extra precaution flotation bags could have been fitted into the hull.

Q. And what do you think of the feasibility with the equipment at Kaunakakai of placing that vessel on a barge and bringing her to Honolulu in that manner?

A. That I believe could have been carried out, yes.

Mr. Waddoups: I think that's all.

Mr. Greenstein: Just one question, if I may.

Recross-Examination

By Mr. Greenstein:

Q. Mr. Gallagher you are the Mr. Gallagher that is referred to in the charter agreement between the

(Testimony of Frank Howard Gallagher)

Indemnity Marine Insurance Company and King Limited, "Maizie C"? [111]

A. Yes, I am the only person by that name in this——

Q. In other words, "The said vessel Maizie C shall get underway from Honolulu on or about June 10th, 1949, and proceed to Kaupo, Maui, and there control of said vessel shall pass to Mr. Gallagher, American Bureau of Shipping Surveyor . . ." You are the Mr. Gallagher? A. That is correct.

Mr. Greenstein: I have no further questions.

The Court: Well, after you arrived at Kaunakakai, why didn't you bring her to Honolulu?

The Witness: I went to Kaunakakai primarily to note the condition of the "Miss Philippine." Such condition was reported to the insurance company agent in my report. From then on I was not directed to carry out any further survey. The vessel remained at the wharf at Kaunakakai, and the matter closed as far as I was concerned.

The Court: You didn't make any report after you had gone over and righted the vessel, examined her first and then righted her; you didn't make any report to the principal?

The Witness: I stated my attendance at Kaunakakai; also stated that the vessel was rotated and placed upright, keel down; and the buoyant vessel was then left at the Territorial wharf.

The Court: And that was the end of it?

The Witness: That is true, sir. [112]

The Court: Well, in righting her you are quite

(Testimony of Frank Howard Gallagher)

sure that her walls weren't crushed by the weight, the pressure of your hawser around her?

The Witness: Yes, I feel certain.

The Court: There has been some testimony here that after she was taken out of the water at Kaunakakai that there was an additional damage.

The Witness: That could readily be, your Honor, in the method employed in removing that vessel from the water.

The Court: Well, do you know what method was employed?

The Witness: No. I knew nothing of the vessel except through hearsay, that the vessel was actually removed from the water at Kaunakakai.

The Court: Do you know upon whose authority or instructions she was removed?

The Witness: No, sir, I do not.

The Court: That's all a closed book to you after?

The Witness: After I left Kaunakakai my interest in the matter ceased.

The Court: You don't know who took charge from there?

The Witness: No, sir, I do not.

The Court: All right.

Mr. Waddoups: I have no further questions.

Mr. Greenstein: No further questions.

Mr. Waddoups: You may step down, Mr. Gallagher. [113]

(Witness excused.)

Mr. Waddoups: Mr. Chipchase, will you take the stand, please?

CALVERT GRAHAM CHIPCHASE

a witness in behalf of the Respondent, being duly sworn, testified as follows:

Direct Examination

By Mr. Waddoups:

Q. Will you state your name, please?

A. Calvert Graham Chipchase, C-a-l-v-e-r-t, G-r-a-h-a-m, C-h-i-p-c-h-a-s-e.

Q. Where are you employed?

A. I am employed by the Bonding and Insurance Company, Limited.

Q. And what is your business there, your position? A. My position is treasurer.

Q. Are you familiar with the records of that company, that is, the marine records of the company relative to the case of the "Miss Philippine"?

A. I am.

Q. The insurance records and correspondence concerning it? A. I am.

Q. And have those records since June of 1949 been in [114] your custody?

A. Except for the time they have been in your custody.

Q. And have you received in the course or since June 6, 1949, any written notice of abandonment, aside from the letter of June 14th, 1949, now in evidence and marked Exhibit "I"?

A. No, I have not.

Q. And do the records of your company reflect any such written notice aside from this one exhibit?

(Testimony of Calvert Graham Chipchase.)

A. To the best of my knowledge, no.

Mr. Waddoups: No further questions.

Cross-Examination

By Mr. Greenstein:

Q. Mr. Chipchase, when was the first time that your office knew of the stranding of the vessel?

A. I believe when we read in the paper, Mr. Greenstein, was the first knowledge of it, if my memory serves me correctly. And it was a long, a long time ago. I would like to qualify that, however, to the extent that someone in our office, or perhaps myself, may have heard of it by word of mouth. I don't really know, to be perfectly honest with you.

Q. Well, let's see. I think we have a letter in evidence at this time of Mr. Matthew. Well, Mr. Matthew is your office manager? [115]

A. Mr. Matthew is my office manager.

Q. And the office did send a letter on June 9th, I take it? A. That is correct.

Q. So you did know about the loss—right?

A. That's correct.

Q. Now, the employment of King Limited in the charter party was pursuant to instructions from your office, was it not?

A. The employment of King Limited in pursuance of the charter party was with the consent of the principal, of my, of the company's principal, yes.

(Testimony of Calvert Graham Chipchase.)

Q. Just for simplicity, it was through the authority of your office?

A. The delegated authority of my office, yes.

Q. And the decision to take the "Miss Philippine" off the reef and refloat it was pursuant to your authority? A. That's correct, sir.

Q. In other words, your insurance company, meaning the insurance company you represent, the Respondent herein, did take control of the "Miss Philippine," did it not, when it took it off Kaupo?

A. Yes, it did.

Q. And you continued to have that control?

A. King Limited continued to have the control, the [116] active control.

Q. Well, now, let's look at the charter party. Mr. Gallagher was your agent?

A. That's correct.

Mr. Waddoups: If your Honor please, I will object to this line of questioning on the grounds that it is not properly within the scope of the direct examination. He was asked of notice of abandonment.

Mr. Greenstein: Well, it just saves time. We can excuse the witness and then call him as our witness.

The Court: Well, I was thinking that.

Mr. Waddoups: We will withdraw the objection.

The Witness: What was the question again, Mr. Greenstein?

Q. Well, I asked you to look at this charter party

(Testimony of Calvert Graham Chipchase.)

with reference to paragraph 2 in which reference is made that the control of said vessel shall pass to Mr. Gallagher. Now, Mr. Gallagher was your agent, was he not? A. That's correct.

Q. So actually the control of the vessel on the route was your control?

A. Unfortunately, yes.

Q. Now, I take it that the insurance company did not have the vessel repaired—right?

A. That's correct. [117]

Q. When did you give up control of the vessel? Or let's put it, where, if you don't know the date?

A. The time and place that the charter money ran out, I gave up control, Mr. Greenstein.

Q. You gave up the control to King Limited?

A. That's correct.

Q. And they in turn gave up control to the party who has it in the back yard? No further questions.

The Court: Well, I heard what you said, but I am not quite sure what you mean by what you said. Now, you engaged the King company to take the vessel off the beach there, and you put a time limit or a money limit?

The Witness: Yes, by the terms of the charter party they were to be paid at the rate of $15.00 an hour.

The Court: And that time expired when they had the vessel in tow out at sea?

The Witness: That's correct, sir.

The Court: Now, they didn't abandon the vessel

(Testimony of Calvert Graham Chipchase.)

at that time, but went ahead and go with responsibility and apparently on their own time took her into safe port and tied her up. Now, you say that when your contract with them ran out by its terms, that you abandoned the boat?

The Witness: They asked us for instructions, your Honor, and we said there are none.

The Court: So it was up to them to do whatever they [118] wanted? They could cut her loose and be responsible only to the laws and regulations under which the Coast Guard operates?

The Witness: Right, yes, sir.

The Court: All right.

Redirect Examination

By Mr. Waddoups:

Q. Did you pay the cost of having the vessel righted at Kaunakakai?

A. We paid King Limited fifteen hundred dollars, in accordance with the charter.

Q. Who paid the cost of having her righted at Kaunakakai? A. Oh, the insurance company.

Q. Your insurance company?

A. My insurance company.

Q. And was there a limit to your authority from your mainland office as to how much you could expend in transporting that vessel?

Mr. Greenstein: That is objected to, if the Court please.

Mr. Waddoups: No further questions.

(Testimony of Calvert Graham Chipchase.)

The Court: I think that would be an interesting thing to know in the case, if there was. Was there any limit?

The Witness: There was a limit, your Honor, if I may use my own words a little bit. King Limited approached us and asked that they be given the salvage job, that we engage [119] them. And they said they could do it for fifteen hundred dollars, as I recall. We called my company on the mainland and explained the situation to them. They said, all right, if it can be done for the fifteen hundred dollars, go ahead. And that point the charter party was drawn and signed before I personally saw it. Then there were no further limitations put on the expenditures except in the usual agent-principal relationship in the matter of good faith. We were authorized and are authorized to make reasonable expenditures.

On the advice of Mr. Gallagher that there was in his opinion, that in his opinion it was desirable to right the vessel at Kaunakakai, I felt justified in authorizing the expenditure for so doing it, yes, sir.

The Court: Well, your company did authorize Gallagher to take hold of the vessel again after you had washed your hands of her while she was at sea?

The Witness: We didn't exactly take hold of her, your Honor. We went over there and she was lying alongside. We put a sling around her and righted her. To that extent we took over.

The Court: And after that was done, why, you abandoned it?

(Testimony of Calvert Graham Chipchase.)

The Witness: We tied her up and left her, yes, sir.

The Court: All right.

Mr. Waddoups: You may step down. [120]

(Witness excused.)

Mr. Waddoups: We have no further evidence to present, your Honor.

The Court: I beg your pardon?

Mr. Waddoups: We have no further evidence to present at this time.

Mr. Greenstein: We have no further evidence, no rebuttal.

The Court: Suppose we come back at half-past one? Is that a convenient hour?

Mr. Waddoups: Yes, your Honor.

Mr. Greenstein: Yes.

The Court: For the argument in this case. The argument won't be long, will it?

Mr. Greenstein: I will waive opening argument.

Mr. Waddoups: We'd like to present an argument, your Honor.

The Court: All right. Half-past one.

(The Court recessed at 11:30 a.m.) [121]

Afternoon Session

The Clerk: Admiralty No. 417, Fulgencia D. Cadiente, Libelant, versus The Indemnity Marine Assurance Company, Limited, Respondent.

The Court: Now, the Libelant waived the opening argument, so that you may proceed.

Mr. Waddoups: If your Honor please, yesterday in arguing our motion for a Non-suit, for a voluntary Non-suit, we addressed ourselves to the question of the utter and complete failure of the proof of total loss or constructive total loss, and also addressed ourselves to the failure on the part of the Libelant to carry out his duty under the contract of insurance, to sue and labor for the vessel in the interest of diminishing and preventing damages. We again renew and urge those points in connection with the case in chief. And as to other points of law that are presented Mr. Brown of our office will present argument. There are some rather nice points involved and the thought that has occurred to me, which I submit to your Honor, is that perhaps the Court would prefer to have a memorandum of authorities than mere oral argument on it. I consider them very serious points. We leave that to the Court's discretion and decision at this time.

The Court: Well, perhaps I would like to have a written memorandum, but at this time I would be glad to hear oral [122] argument, and then, if I feel that written memoranda ought to be presented, then I will ask for them.

Mr. Waddoups: Very well, your Honor.

(Argument of Counsel.) [123]

January 19, 1950

The Clerk: Admiralty No. 417, Fulgencia D. Cadiente vs. Indemnity Marine Assurance Company, Limited, for further trial.

Mr. Greenstein: Ready for the Libelant.

Mr. Waddoups: Ready for Respondent, your Honor. Before Libelant proceeds with his argument, we have given a great deal of thought and consideration to questions of law involved in this case, your Honor. I am frank to say the question is a very nice one and we feel that we cannot do justice to it verbally and would like, therefore, before your Honor rules in this case, to file with the Court a written memorandum covering it.

The Court: Very well. Do you want to add anything to your memorandum?

Mr. Greenstein: Yes, if the Court please. As a matter of fact, the memorandum we did submit was merely at an interlocutory stage.

(Argument by Counsel.)

The Court: How much time do you wish to prepare?

Mr. Waddoups: I think a week would be sufficient, your Honor.

The Court: A week from today. That would be the 26th. And you? [123-A]

Mr. Greenstein: I should like a week after to reply to their brief.

The Court: A week after. All right. A week

from today will be the 26th and a week following will be February 2. By noon of those days.

All right.

(Thereupon, at 10:25 a.m., January 19, 1950, the hearing in the above-entitled matter was adjourned.)

March 27, 1950

The Clerk: Admiralty No. 417, Fulgencia D. Cadiente vs. Indemnity Marine Assurance Co., Limited. Case called for further hearing.

Mr. Greenstein: Ready for the Libelant.

Mr. Waddoups: Ready for the Respondent.

The Court: What is the number?

The Clerk: Admiralty 417.

The Court: Very well.

Mr. Greenstein: Shall we proceed, your Honor?

The Court: Yes.

Mr. Greenstein: Mr. Cadiente, will you resume the stand, please?

The Clerk: Has he already been sworn in the previous case?

Mr. Greenstein: He was originally. May he be reminded that his oath is still binding?

DELESFORO B. CADIENTE

recalled as a witness on behalf of the Libelant, having been previously duly sworn, was examined and testified further as follows:

The Court: You recall you have been sworn in this case and you are now testifying under oath.

The Witness: Yes, sir. [125]

Direct Examination

By Mr. Greenstein:

Q. Mr. Cadiente, for the record will you state your name again?

A. Delesforo B. Cadiente.

Mr. Waddoups: May I interrupt at this time, your Honor? I don't recall, Mr. Greenstein, whether or not you invoked the witness rule before.

Mr. Greenstein: I am glad of your intervention. I think the nature of the testimony is such that possibly one of the two agents might be excused, perhaps Mr. Matthew.

Thank you, Mr. Waddoups.

Q. (By Mr. Greenstein): And you have testified at the earlier hearing in this case, have you not?

A. Yes, sir.

Q. You are the same Mr. Cadiente who testified earlier? A. Yes, sir.

Q. Now, throughout all of the dealings in connection with this sampan and the insurance company, you have been the agent of the registered owner, your wife, have you not? A. Yes, sir.

(Testimony of Delesforo B. Cadiente.)

Q. There is no question about that?

A. Yes, sir.

Q. Would you tell us in your own words, and you can start at the very beginning, when you were apprised of the [126] loss of the "Miss Philippine," tell us what you did with reference to ascertaining the condition of the "Philippine," and with further reference to whether or not you gave any notice of abandonment to the insurance company. Just tell us the story in your own words, briefly.

A. June 6, nine o'clock in the evening——

Q. Will you speak slowly and distinctly so the Court can understand?

A. June 6, nine o'clock in the evening I was informed that "Miss Philippine" is grounded at Hana, Maui. Then in the next morning I came to Honolulu to get a ticket for me to go to Maui, but before I proceeded to Maui, Mr. Hagood, who is working at the King, Limited, come and see me and ask me if I wanted him to salvage the boat. Well, I told him, "I am not yet decided, because I have not seen the condition of the boat." So he asked me if I could pay his fare to go with me to Maui. I said "yes," so we went to Maui. When we reached Maui——

Q. When did you reach Maui, what day?

A. On the 7th.

Q. Proceed.

A. We reached Maui about 4 o'clock in the afternoon. I took a taxi to the boat—to the place

(Testimony of Delesforo B. Cadiente.)

where the boat was grounded. He took an airplane. The next morning I found out that the boat was badly damaged and the keel almost gone [127] and some of the breast of the boat gone. So I was thinking then that it was hopeless for me to salvage the boat.

Mr. Waddoups: I move to strike the last statement, your Honor, on the ground that it is not binding on the libelee as to what he was thinking at that time.

Mr. Greenstein: I will concur in that at this time, if the Court please.

The Court: That is true. It isn't binding on the libelee what he was thinking.

Q. (By Mr. Greenstein): Proceed.

A. So the next morning, Wednesday, I went back again to the boat, and I found out that the boat was getting worse and worse, so I decided then——

Q. Pardon me. In the meantime was Mr. Hagood still on Maui, or not?

A. No, he came back to Honolulu the same day.

Q. All right.

A. So I found out that the boat was getting worse, so then from that time I decided to abandon the boat.

Q. What did you do, if anything, on that morning, the 8th?

A. After I decided to abandon the boat, I went up to a telephone and call up the Coast Guard of

(Testimony of Delesforo B. Cadiente.)

Honolulu, asking them to notify Mr. Hagood, who is representing the towing of the boat, to tell him not to come to Maui any more because I [128] am abandoning the boat, thinking that Mr. Hagood will also notify the insurance.

Mr. Waddoups: I move to strike what he was thinking and object to any statement of what he was thinking. We have no objection to his telling what he did in the process of, but his own impressions, I am sure, are not of interest to this Court.

The Court: What he thought Mr. Hagood might do is not evidence.

Q. (By Mr. Greenstein): Tell us what you did.

A. Then I called up the Coast Guard, telling——

Q. This is the morning of June 8th?

A. Yes, sir.

Q. Thank you.

A. (Continuing): And telling the Coast Guard, asking the Coast Guard to notify Mr. Hagood not to come to Maui any more because I was abandoning the boat, thinking——

Q. No, don't tell us what you were thinking.

Q. Prior to this time, to your knowledge had Mr. Hagood also been in communication with the insurance company?

A. Yes, sir, because——

Q. When was that?

A. Well, that time before we went to Maui he called up the insurance.

Q. What day was that? [129]

(Testimony of Delesforo B. Cadiente.)

A. That is Tuesday, the seventh.

The Court: I didn't get the statement. "That time we went to Mauri," what happened?

(Answer read.)

Q. (By Mr. Greenstein): In other words, the day before Mr. Hagood had called up the insurance company in your presence? A. Yes, sir.

Q. After you made this 'phone call to the Coast Guard in Honolulu, what did you do?

A. I came back to Honolulu.

Q. And what did you do the following day?

A. And then the next day, Thursday the 9th, early in the morning, I went to my boat builder, explaining to him the condition of the boat, telling him that the keel almost gone and some of the breast all gone. Then after I told him the condition of the boat, he told me——

Mr. Waddoups: I will object to what he told this witness as being hearsay, your Honor.

Mr. Greenstein: Well, if your Honor please, we have a little different situation here, because if we get to the element of abandonment, we gether to whether or not the owner had a right to abandon, and we are permitted to go into such questions as to what he did to ascertain the salvagability.

Mr. Waddoups: We have no objection, your Honor, as to what this particular witness did, but we certainly [130] object to his testifying as to anything the boat builder told him. Presumably, the boat builder is available and his own testimony is the best evidence. Purely hearsay.

(Testimony of Delesforo B. Cadiente.)

Mr. Greenstein: May we have a ruling on that, your Honor?

The Court: That is correct. What the boat builder told him would best come from the boat builder.

Q. (By Mr. Greenstein): Now, you did discuss the condition of the boat with the boat builder?

A. Yes, sir, I did.

Q. And that was the man who originally built "Miss Philippine"? A. Yes, sir.

Q. Now, as a result of that conversation, did you have a decision as to whether or not you were going to abandon the boat?

A. Yes, I was going to abandon the boat.

Q. And that was after you had a conversation with—who was the boat builder?

A. Tanimura.

Q. And this, I take it, is June 9?

A. June 9, yes, sir.

Q. Now, I show you an exhibit in evidence——

The Court: Mr. Tanimura?

Mr. Greenstein: Tanimura is the original boat [131] builder.

Q. (Continuing): Libelant's Exhibit 11, and ask you whether you have seen that letter before?

A. Yes, sir.

Q. That is the letter you received from the bonding and insurance company? A. Yes, sir.

Q. The agent for the respondent here. When did you receive this letter?

(Testimony of Delesforo B. Cadiente.)

A. About 8 o'clock on the 9th of June, sir.

Q. About 8 o'clock.

The Court: Ninth of June?

Mr. Greenstein: Ninth of June, being a letter from the bonding and insurance agency making a demand——

The Court: Morning or evening?

The Witness: Evening.

Q. (By Mr. Greenstein): You received this in the evening of that day? A. Evening.

Q. After you received that letter, what did you do?

A. The next day, the 10th, I come right away and go to Mr. Matthew's office.

The Court: What is the exhibit number?

Mr. Greenstein: Exhibit No. 11.

Q. (By Mr. Greenstein): Now, I take it, as a result of [132] that letter, you went to the insurance company the following morning?

A. Yes, I went.

The Court: That would be on the 10th?

The Witness: On the 10th.

Q. (By Mr. Greenstein): Now tell us what you did and who was there.

A. On the 10th of June, as soon as I received the letter, I went to see Mr. Matthews, who sent me the letter. As there were plenty people in his office, about seven of them——

The Court: So Mr. who? Marcus, you say?

Mr. Greenstein: Matthew.

(Testimony of Delesforo B. Cadiente.)

The Witness: Matthews.

Q. (By Mr. Greenstein): Do I take it you went to his office? A. Yes, I went to his office.

Q. And that is the bonding and insurance office at Fort and Merchant Street? A. Yes.

Q. What did you tell Mr. Matthew, if anything?

A. I told Mr. Matthews that I just came back from Maui to examine the boat, and I found the condition of the boat was badly damaged, that I am abandoning the boat.

Q. Did you tell Mr. Matthews that you had talked to the boat builder about the condition of the boat? [133]

A. Yes, I did, and I told Mr. Matthews that I called up the Coast Guard to notify the King Limited that I am abandoning the boat. Then he told me, "Well, you better go to the lawyer's office"; that means Mr. Waddoups' office.

Q. Just a minute, let's get this. Will you repeat that slowly?

The Court: You say you told him you had called up King, Limited, and asked them to tell the insurance company that you were abandoning the boat; is that what you said?

The Witness: No, sir, I called up the Coast Guard.

The Court: Oh, Coast Guard.

The Witness (Continuing): To notify the King, Limited.

The Court: Yes.

(Testimony of Delesforo B. Cadiente.)

The Witness (Continuing): Not to come to Maui any more because I am abandoning the boat.

The Court: Just between you and the Coast Guard and King, Limited?

The Witness: Yes.

The Court: You told King, Limited, that you were abandoning the boat, and that was when? On the 8th or 9th?

The Witness: Ninth.

Mr. Greenstein: That was on the 8th.

The Court: Yes.

Q. (By Mr. Greenstein): Now, I take it, Mr. Cadiente, [134] that on the 10th you were in the office of Mr. Matthew and told him you were abandoning the boat; is that correct? A. Yes, sir.

Q. And did you tell him that you had arrived at this decision as a result—as a result of what things?

A. Of abandoning the boat.

Q. Did you tell him why you were abandoning the boat?

A. Because after I examined the boat, look at the boat, that the keel is gone and most of the breast was gone, so I know that the boat cannot be fixed and cannot be towed to Honolulu.

Mr. Waddoups: Move to strike the last statement, "I know the boat cannot be fixed," as being a conclusion of this witness. The witness is not qualified as an expert surveyor in the matter of salvage, your Honor.

The Court: Well, I think the witness could tes-

(Testimony of Delesforo B. Cadiente.)

tify that he thought the boat couldn't be salvaged to account for his actions in saying that he abandoned it. Of course, he used the word "know," but that is not an exact word of meaning. I can only construe in my own mind the use of the word "know" to be his belief in the matter.

Mr. Greenstein: I will concur in that construction, your Honor.

Q. (By Mr. Greenstein): Now, before you decided to abandon, you had personally inspected the boat, had you not? [135] A. Yes, I did, sir.

Q. And before you had decided to abandon, you had talked to your boat builder? A. I did.

Q. And described the condition to him, had you not? A. I did before.

Q. And before you had decided to abandon, you had talked to the Coast Guard?

A. To the Coast Guard.

Q. About similar wrecks, had you not?

A. Yes.

Q. You are sure on the morning of June 10 in the office of the bonding and insurance company, the agent for the respondent here, you told Mr. Matthew that you were abandoning the boat?

A. Yes, sir, I did.

Q. There is no question about that in your mind?

A. No. I tell him.

Q. Did you have a further conversation that day with anybody connected with the insurance company? A. Yes.

(Testimony of Delesforo B. Cadiente.)

Q. What happened later?

A. Well, at that time Mr. Matthew told me to go to Mr. Waddoups' office, so I went over there. There were several men, I don't know who they were. First time. [136]

Q. So you had a further conference in the office of Mr. Waddoups, the attorney for the respondent?

A. Yes, sir.

Q. And what did you say or what did they say, if you remember, about the abandonment of the boat, if that came up?

A. They asked me if I am going to salvage the boat, so I told them after I inspected the boat, examined the boat, I told him I am abandoning the boat. Then they told me to get a lawyer to represent myself in there.

Q. And it was after that that you came to see me? A. Yes.

The Court: That was on the 10th, was it?

Mr. Greenstein: I am sorry, your Honor.

The Court: On the tenth of June?

Mr. Greenstein: Tenth, your Honor; the same morning you went in to see Mr. Matthew?

The Witness: Yes, same morning.

Mr. Greenstein: You may examine him.

Cross-Examination

By Mr. Waddoups:

Q. Mr. Cadiente, are you sure that the date that you had the conference in my office was the same

(Testimony of Delesforo B. Cadiente.)

date that you gave Mr. Matthew verbal notice of abandonment? A. Yes, sir, I did.

Q. You are sure of that fact? [137] A. Yes.

Q. And I think your testimony also is that you told Mr. Hagood that you were abandoning the boat before you talked to Mr. Tanimura.

A. No, sir, I called up Mr. Hagood and then I come over here the next morning before I went to see Tanimura.

Q. Didn't you call the Coast Guard while you were on Maui before you saw Tanimura and tell them to tell Hagood to cease the salvage operation?

A. Yes, I did. That is the 7th and 8th and then the 9th I come over here.

Q. So that the notice that you gave to Mr. Hagood about ceasing salvage operations was given prior to the time you saw Tanimura?

A. No, before I saw Tanimura.

Q. That is what I mean, before you saw Tanimura. A. Yes.

Q. And you had, at the time you gave Hagood that information, decided to abandon; is that correct?

A. First time I told Mr. Hagood that I am abandoning the boat I was at Maui. Then I come back. I went in and see Tanimura, and then from Tanimura I went again to King, Limited, offices and see Mr. Hagood. I told him I am abandoning the boat, so I notify Mr. Hagood two times.

Q. Once before you saw Tanimura and once after; is [138] that correct?

(Testimony of Delesforo B. Cadiente.)

A. No, I only see once Tanimura.

Q. No. You notified Mr. Hagood through the Coast Guard once. A. Yes.

Q. Before you saw Tanimura. A. Yes, sir.

Q. And then again you saw Hagood after you saw Tanimura. A. Tanimura.

Q. Is that correct? A. Yes, sir.

The Court: That would be on the 8th and the 9th; is that correct?

Mr. Waddoups: Yes, your Honor, that is the way I understand his testimony.

Q. (By Mr. Waddoups): Had you read this insurance policy over before you made an abandonment? A. No, sir.

Q. You didn't know the contents of that policy?

A. No.

Q. The Company had told you that under the policy it was your duty to salvage, hadn't it?

A. No insurance company tell me about it.

Q. Didn't they make demand upon you, as reflected by Libelant's Exhibit 11, that letter that was just showed you, [139] to effect salvage?

A. Yes, they did. They tell me to proceed salvaging after I examine the boat.

Q. And you weren't aware of any of the provisions of this insurance policy at the time this thing happened; is that correct? You didn't know what was in the policy? A. No.

Q. You had had a policy before calling for 8 per cent premium, had you not? Before this policy?

(Testimony of Delesforo B. Cadiente.)

A. No, I never get chance to read the policy because the policy was kept by the Bank of Hawaii.

Q. Isn't it a fact, Mr. Cadiente, that you took this policy out, and by "this policy" I refer to Libelant's Exhibit D, in order to enable you to get a loan at the bank; isn't that right?

A. No, I never got no chance to read that.

Q. Answer my question.

Mr. Waddoups: Will you read it to him, please?

(Question read.)

A. No, I never get no chance to hold that policy.

Q. No, you misunderstand my question. The reason why you took out this policy was so you could borrow some money on your boat at the bank; isn't that correct? A. Yes, I did.

Q. And before this policy was taken out, you had had [140] a policy which called for an 8 per cent premium; is that correct?

A. Of the insurance.

Q. Yes, the policy before the one that is in issue here. Isn't that correct, Cadiente?

A. I never started a policy myself.

Q. Wasn't your premium on the old policy a lot more than the premium on this policy?

A. I don't know.

Q. Well, you have been your wife's agent all this time, haven't you, Cadiente?

A. Yes, but I never got no chance to start a policy.

(Testimony of Delesforo B. Cadiente.)

Q. You paid out the money for your wife, didn't you? A. Yes.

Q. And isn't it a fact that this is a 3 per cent policy that you took out to get a loan and before this you had had an 8 per cent policy that cost almost three times as much as the premium on this policy?

A. You mean when I borrowed the money from the bank?

Q. No. Before you took out the policy you had one other policy; is that correct? A. Yes.

The Court: Same boat?

Mr. Waddoups: Beg pardon?

The Court: Same boat? [141]

Q. (By Mr. Waddoups): On the same boat?

A. Same boat.

Q. And that policy had a premium much higher than the policy called for in this one; isn't that correct? A. Yes, sir.

Q. And the other policy was one that covered averages and other losses; isn't that correct? Besides constructive total loss?

A. Oh I don't know.

Mr. Waddoups: That is all.

Redirect Examination

By Mr. Greenstein:

Q. Mr. Cadiente, where were you born?

A. In the Philippines, sir.

Q. How old are you? A. Forty-six.

(Testimony of Delesforo B. Cadiente.)

Q. You are a citizen of the United States, I take it? A. Yes, sir.

Q. By virtue of naturalization? A. Yes, sir.

Q. How much schooling have you had?

A. High school.

Q. Is that in the Philippines?

A. Yes, eighth grade in the Philippines.

Q. I show you Libelant's Exhibit D, which is the [142] insurance policy in this case upon which we are suing, and I ask you whether or not anybody from the bonding and insurance company has ever explained this policy to you prior to the loss.

A. Nobody.

Mr. Greenstein: You may examine.

Recross-Examination

By Mr. Waddoups:

Q. What schooling has your wife had?

A. What is that?

Q. What schooling has your wife had?

A. Same.

Q. Were you present when this policy was taken out? A. Yes.

Q. Did anybody explain to your wife the contents of this policy? A. No, sir, nobody.

Q. You didn't know what this policy said when you took it out?

A. No, because there was an agent that come to our house representing the bonding and insurance company, Mr. William Cruz, and he told me to buy

(Testimony of Delesforo B. Cadiente.)

an insurance of the boat, and so because we are interested to have the boat insured, we said "yes."

Q. Why did you change from the other type of policy to [143] this policy?

Mr. Greenstein: That is objected to, if the Court please. We are suing on this policy, not another policy.

Mr. Waddoups: Presumably you are inferring he doesn't know anything about insurance policies. Presumably, that would go to the question of whether or not he did.

Mr. Greenstein: I will withdraw the objection.

The Court: Will you read the question back?

(Question read.)

The Witness: Do you want me to answer that?

Q. (By Mr. Waddoups): You have testified before you signed the policy with the Indemnity Marine Assurance Company, which is in evidence as Libelant's Exhibit D, and which I hand you, that there had been another insurance policy which called for an 8 per cent premium, or a premium very much higher than this one; is that right?

A. Yes.

Q. Now, why did you change from that other type of policy to this policy?

A. Because when the expiration of the insurance——

The Court : What?

A. (Continuing): Because when the first insurance was expired, the agents of the insurance they

(Testimony of Delesforo B. Cadiente.)

never come and see us any more. So I don't know how this man learned that the insurance of my boat was expired, that he came over and see [144] us and he want us to insure the boat through the bonding insurance.

Q. What was the name of that man?

A. William Cruz.

Q. (Spelling): C-r-u-z? A. Yes.

Q. Did you sign that at your home or in the bonding and insurance company's office—or did your wife sign it, rather?

A. At the house; in the house.

Q. At your home? A. Yes, at the home.

Mr. Waddoups: I think that is all.

Redirect Examination

By Mr. Greenstein:

Q. Now, Mr. Cadiente, when Mr. Waddoups asked you, Did you sign that?—you haven't signed an insurance policy, have you? Your signature isn't on the policy, is it?

A. No. He asked me if I signed it and I said "no," and then he asked me about my wife.

Q. A little slower. You haven't signed anything on an insurance policy? A. No.

Q. Now, as a matter of fact, the bonding and insurance company didn't give you a sample of a policy and show it to [145] you before you took out the insurance? A. No, sir.

Q. As a matter of fact, this is no different from

(Testimony of Delesforo B. Cadiente.)

any other insurance situation, you bought an insurance policy without ever seeing the contract; isn't that correct?

Mr. Waddoups: Objected to——

A. That is right.

Mr. Waddoups (Continuing): ——as leading, your Honor.

The Witness: That's right.

Mr. Waddoups: This is still his witness.

The Court: It is leading.

Q. (By Mr. Greenstein): Did they show you this particular contract of insurance before you indicated your willngness to buy it?

A. No, sir, I never seen it.

Mr. Waddoups: Do I understand Counsel to intimate that there is no contract here, that there is no meeting of the minds?

Mr. Greenstein: No, I am not saying that. I am simply saying this insurance policy is the same as every other policy in the Territory out here. I don't know of anybody who gets to look at a contract of insurance before they buy it. That is notorious. It is common sense.

Q. (By Mr. Greenstein): So that your testimony is you were not shown this policy before you bought it? [146] A. No, sir.

Q. Right or wrong?

A. Right. I never seen it.

Q. At no time has anybody ever explained this policy to you? A. No, sr, nobody.

Mr. Greenstein: That is all.

Mr. Waddoups: No further questions.

Mr. Greenstein: Will you resume your seat, Mr. Cadiente?

(Witness excused.)

Mr. Greenstein: Would you call Mr. McAndrews? This witness has already testified, your Honor.

JAMES T. McANDREWS

called as a witness on behalf of the Libelant, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Greenstein:

Q. Mr. McAndrews——

The Court: What is the name?

Q. (By Mr. Greenstein): State your name, please.

A. James T. McAndrews.

Q. And you previously testified in this case?

A. That's right. [147]

Q. Will you——

Mr. Greenstein: May the Court advise him that the oath is still binding?

The Court: You understand that——

The Witness: Yes.

The Court (Continuing): ——you have been

(Testimony of James T. McAndrews.)

sworn in this particular case and you are now testifying under oath.

Q. (By Mr. Greenstein): I again show you Libelant's Exhibit B to refresh your memory. Would you examine the date and when you finish examining it, indicate to me?

A. You want me to indicate what?

Q. You have finished examining it? A. Yes.

Q. This is a charter party which purports to have been signed on the 11th day of June, 1949?

A. Yes.

Q. That is correct? A. Yes.

Q. Now, prior to the signing of this charter party, I ask you whether or not you attended a meeting in Mr. Waddoups' office at which time Mr. Cadiente was also present?

A. Prior to the signing?

Q. Yes. A. No.

Q. Well, at the time of the signing, the same day, [148] was Mr. Cadiente also present?

A. No.

Q. Have you ever seen Mr. Cadiente before?

A. Yes.

Q. At a meeting with any of the other parties?

A. Yes, I saw him in Mr. Waddoups' office, but it was after the signing of the charter party.

Q. It was after the signing of the charter party. Let me ask you this: As representative of King, Limited, you had dealings with the insurance company in connection with the arranging for this charter party? A. That's correct.

(Testimony of James T. McAndrews.)

Q. And I put it to you directly: Were you advised by a representative of the insurance company that in point of fact Mr. Cadiente had abandoned the boat?

Mr. Waddoups: Objected to as leading.

The Court: It is leading in its frame.

Mr. Greenstein: I will withdraw it.

Q. (By Mr. Greenstein): Prior to the signing of the charter party, Mr. McAndrews did you have any conversation with representatives of the insurance company in this case as to whether or not there had been an abandonment by the owner?

A. Well I had conversations with the insurance company's representative, but I do not recall that there was any [149] mention of abandonment. No, I don't recall that there was any mention.

Q. Now you are sure about that?

A. Well, it was so long ago that it is hard to be sure about it, but to the best of my memory I don't recall any such statement having been made by the representative of the insurance company.

Q. Well, was there any understanding as to whether there had already been an abandonment?

Mr. Waddoups: Objected to as being an improper question. This witness can't testify as to what other people understood. Calling for a conclusion of the witness.

The Court: Let's have the question again.

(Question read.)

(Testimony of James T. McAndrews.)

The Court: Any understanding with whom? On the part of the witness, or what?

Mr. Greenstein: On the part of the witness as to the understanding of the insurance company.

The Court: Well, I don't know that he is competent to answer that.

Q. (By Mr. Greenstein): Now, as a result of your entry into this charter party with the insurance company, the "Maizie C," your boat, proceeded in accordance with the terms. Now Mr. McAndrews, did you stay in communication with the "Maizie C" during the salvage operations? [150]

A. Yes, I was in communication with the boat by radio 'phone.

Q. And would you just describe that in a little more detail? Where was your receiver?

Mr. Waddoups: If your Honor please, I think we have gone into the operations of the "Maizie C." It was my understanding the Court was interested in this hearing on the question of the time and manner of abandonment and notice to the insurance company, if in fact there was a time and manner and notice.

Mr. Greenstein: I concur somewhat in the remarks of Counsel, and I appreciate this was called for a limited purpose. I do beg leave to ask one question which may or may not tie it up and have some probative value.

Q. (By Mr. Greenstein): You are familiar with the course that the "Maizie C" took in connection with the towing of the "Miss Philippine"?

(Testimony of James T. McAndrews.)

A. Yes.

Q. And you were in communication with both the "Maizie C" and the insurance company?

A. That is correct.

Q. Did you get in touch with the insurance company about the $1500 had been used up, which is referred to in your charter party? A. Yes, sir.

Q. And what were you instructed by the insurance [151] company?

A. When it was used up, we asked for further instructions in accordance with the terms of the charter party.

Q. And what were your further instructions?

A. And we were advised that there were no further instructions.

Q. So that the ultimate tying up of the "Miss Philippine" was not in pursuance to instructions issuing from the insurance company?

A. That's correct.

Mr. Greenstein: No further questions.

Cross-Examination

By Mr. Waddoups:

Q. Mr. McAndrews, you have testified that you were present in my office at a time when we held a meeting there. A. Yes, sir.

Q. Do you recall whether Mr. Cadiente was present at that meeting?

A. He was in the office yes.

Q. He was there with us?

(Testimony of James T. McAndrews.)

A. Yes, he was there.

Q. And do you recall that I told him that so far as the Company was concerned, we still looked to him to salvage that vessel?

A. I remember that very distinctly. [152]

Q. And do you also recall my telling him that the matter had taken on such serious proportions that I felt that in fairness to him he should go seek counsel of his own?

A. I remember that very distinctly.

Q. And have the benefit of the advise of counsel before anything further was done? A. Right.

Q. Do you also recall that the meeting that was held in the office was after the charter party, Libelant's Exhibit B, had been executed?

A. Absolutely.

Q. And it was about two days after, was it not?

A. Yes.

Q. Calling your attention to the fact that this is dated June 11—by "this" I refer to the charter party—would the 13th of June be, in your recollection, a likely date upon which that meeting was had?

A. Well, I would have to check the calendar, but I remember the day the charter party was signed was a Saturday, and it was the following week that we had the meeting.

Q. So that it would have had to have been the 13th at the earliest because you didn't meet on Sunday; is that correct? A. That is correct.

(Testimony of James T. McAndrews.)

Q. And where was the "Miss Philippine" when this [153] meeting was being held?

A. Well, according to the skipper of the "Maizie C," he was off Mala Wharf.

Q. He already had her under tow; is that correct?

A. When our meeting was held, the boat was under tow, yes.

Mr. Waddoups: No further questions.

Mr. Greenstein: No further questions.

The Court: Just a minute.

Mr. Waddoups: Just a minute, Mr. McAndrews.

The Court: When you say the provisions of the charter party were worked out, or exhausted, something to that effect, what do you mean?

The Witness: Well, sir, the charter party, which is an exhibit was entered into on the basis of an amount of money per hour. In other words it was a "no cure no pay" charter party, nor was it a guarantee to bring the boat into any specific port for that specific amount of money, but it said when the amount of money agreed upon, which I believe was $1500, from memory, was exhausted, under the terms of the charter party that we would ask the insurance company whether they wanted us to carry on with the salvage of the vessel or whether they didn't want us to carry on; in other words, did they want to spend any more money. So when that happened, when we had run out of the $1500, we asked [154] the insurance company's representatives, and at

(Testimony of James T. McAndrews.)

that time Mr. Waddoups was speaking for the insurance company, and we put it to him and he said, "No, we have no further instructions."

The Court: You talked to Mr Waddoups?

The Witness: Yes, sir, because that was in his office and he is counsel for the insurance company.

The Court: All right. And it was known then to all parties where the "Maizie C" with the tow was positioned then?

The Witness: I believe I made that plain. I couldn't swear to that, that I told them exactly where it was. I told them it was on the high seas, though, in tow, I believe.

The Court: And they declined to give you any further orders or authority?

The Witness: That's correct, sir.

The Court: So whatever was done after that was at the instance and direction of someone else other than the——

The Witness (Interrupting): Insurance company.

The Court: Insurance company.

The Witness: That's right.

The Court: Did you have any communication with the owner of the boat, or the owner's agent, anyone representing the owner at that time?

The Witness: You mean the owner of the boat that was being towed? [155]

The Court: Yes.

The Witness: No, I don't think I saw Mr. Cadi-

(Testimony of James T. McAndrews.)

ente again after he left Mr. Waddoups' office, and then later on Mr. Greenstein came in, but he only came to collect some data, and as I recall, he didn't ask any questions or anything. I didn't have any communication with him at the time.

The Court: Do I understand that Mr. Cadiente was in Mr. Waddoups' office with you——

The Witness: Yes, sir.

The Court (Continuing): ——at the time that you notified the insurance company that their funds had run out on the towing, or salvaging, operations which had been undertaken by the "Maizie C"?

The Witness: I believe so, sir, that he was there at that time. I couldn't swear to it.

The Court: Do you say you saw him there once. Was that the time?

The Witness: It was the same day, see, sir, and there were two different meetings, as I recall.

The Court: On the same day?

The Witness: On the same day. As I say, it has been quite a while ago, and I can't put my finger right on the exact times.

The Court: Well, at the first meeting at Waddoups' office, do you recall whether it was in the morning or in the [156] afternoon?

The Witness: That I think was in the morning. It was before noon.

The Court: Do you recall what the purpose of that meeting was, how you came to be called there, or how you came to be there, for what reason or purpose you went there?

(Testimony of James T. McAndrews.)

The Witness: Well, yes, sir, I had gone over to the office of the insurance company to report to them the progress of the salvage operation, and, as I recall, at that time I was advised that the meeting would be moved to the office of Mr. Waddoups.

The Court: Yes.

The Witness: So that is where I appeared, at the office of Mr. Waddoups.

The Court: And do you recall that Mr. Cadiente was there at that meeting?

The Witness: I am practically positive that that was the time Mr. Cadiente was there, yes.

The Court: Well, did he go with you?

The Witness: No, he didn't.

The Court: Was he there when you got there?

The Witness: I think he came in after I got there. Both he and Mrs. Cadiente were there.

The Court: Well, then, you say you think there were two meetings on that day? [157]

The Witness: That is my recollection, sir. We left the office and then we came back again.

The Court: You left the office and went elsewhere and then you went back?

The Witness: Back to Mr. Waddoups' office.

The Court: Do you remember for what purpose you went back? Were you called there, or something in your own behalf?

The Witness: I think that in the morning meeting that we had made an appointment to meet again in the afternoon. That is my recollection of the reason I went back.

(Testimony of James T. McAndrews.)

The Court: All parties there had an understanding to meet again in the afternoon?

The Witness: I think so, sir.

The Court: Were Cadiente and his wife, you say, there in the afternoon?

The Witness: I don't remember that they were, sir.

The Court: Well, what were the net transactions of the meeting in the morning and the afternoon?

The Witness: Well, as I recall, first of all in the morning meeting the charter party was inspected by counsel for the insurance company and found to be in order, and then Mr. Cadiente was there, yes, I remember that time, and that was the time Mr. Waddoups said the matter was of such moment that he should avail himself of counsel, and so I presume then [158] that he went out and retained Mr. Greenstein to act for him.

The Court: Was Mr. Greenstein at the afternoon meeting?

The Witness: Yes, he came in in the afternoon. He was there. I remember very distinctly that he was.

The Court: He and Cadiente and his wife were there in the afternoon?

The Witness: No, I don't think that Mr. Cadiente or his wife were there. I think it was just Mr. Greenstein who was there. I am not positive of that, but it seems, to my recollection.

The Court: Was that at this morning's meeting

(Testimony of James T. McAndrews.)
that you got your final, definite instruction, in effect, to proceed no further under any authority of the charter party or of the insurance company?

The Witness: No, I think that was in the afternoon meeting, because I believe that after the meeting in the morning that I was able to get in touch with the boat by radio 'phone and establish its position, and I think that I then reported that at the afternoon meeting. That is my recollection.

The Court: And then you were informed that the insurance company had no further instructions?

The Witness: Yes, sir, that is my recollection.

The Court: And then did you convey that to the master of the "Maizie C"?

The Witness: Yes, I think—yes, I did. I conveyed that to the master of the "Maizie C."

The Court: About what time of the day was that?

The Witness: About three or four, I guess. Probably could get that time exactly from the log of the "Maizie C," though.

The Court: Yes, I suppose. All right. Are there any questions?

Mr. Greenstein: I don't believe it is important, your Honor, but since it has come out, perhaps it will just clear the record with reference to the afternoon meeting. Yes, I came in in the afternoon at the meeting, do you recall?

The Witness: That is what I recollect.

The Court: That was on what date of the month?

Mr. Greenstein: I don't recall the date. Shall we stipulate on that?

(Testimony of James T. McAndrews.)

Mr. Waddoups: I will clarify that for the Court. I am prepared to clarify this date from certain records of our office.

Mr. Greenstein: I will stipulate as to date, if you have it here.

Mr. Waddoups: I might state, your Honor—I understand Counsel will stipulate—I might state that under our system of keeping time at the office, each lawyer in the [160] firm is furnished with what is known as a daily time sheet upon which notations are made either concurrently with doing time or at the end of the day of what work has been done for what particular clients. Those sheets are referred to a girl in the bookkeeper's office, who types them onto master sheets under the name of the client. I had not examined this prior to the hearing before, and it was in an effort the other day, with members of the insurance company, to peg the exact date of this conference that it occurred to me that I might go to our time record and see what was reflected there. And I show Counsel the notation which appears on the typewritten sheet. On that date there appears the following: "June 13." After that, "W," meaning Waddoups. "Conference with Chipchase, Gallagher, Cadiente, et al."

The Court: What day? What time of day?

Mr. Waddoups: That was in the morning, your Honor. The time of day doesn't appear here, but my recollection is that that was in the morning.

Mr. Greenstein: That was before I was in the case.

(Testimony of James T. McAndrews.)

Mr. Waddoups: In the forenoon.

The Court: Conference with whom?

Mr. Waddoups: Chipchase, Gallagher, Cadiente, et al. I might for the record state, and Counsel will take my word for it, there was also in attendance the witness Mr. McAndrews; and Mr. Chipchase, his name appears. And a Mr. [161] Miller, who is also associated with the American Bureau of Shipping. And Gallagher's name already appears here. And during that early morning meeting—I will gladly take the oath and clear this thing up for the Court.

Mr. Greenstein: I will accept your representation.

Mr. Waddoups: I think things will be more orderly if I do. Would the Court prefer that?

Mr. Greenstein: Can we finish this in order? We are worried about the date.

Mr. Waddoups: The date was June 13. There was one meeting in the morning and another in the afternoon. My notation shows: Conference with Chipchase, Gallagher, Cadiente, et al. Conference with Greenstein and two 'phone calls (He says Cadiente——

Mr. Greenstein: I object to that at this time.

Mr. Waddoups: All right.

Q. (By Mr. Greenstein): So that in the afternoon I came in and represented myself as representing the Cadientes?

A. As I recall, that is what occurred.

Q. And I believe I stated to the group that I

(Testimony of James T. McAndrews.)

had been in the case only a few minutes and knew nothing about the factual matter. Is that a fair representation?

A. I recall something like that.

Q. And I think I wanted some notes on the policy. I didn't have a copy of the policy with me and I wanted some [162] notes on, I think the charter party, or the charter party was tendered to me for inspection, and I made some notes and left without committing myself one way or the other. That is a fair representation, is it not, Mr. McAndrews?

A. Yes.

The Court: I think that is all. Are you through?

Mr. Greenstein: I am through with this witness unless Mr. Waddoups has some questions.

Mr. Waddoups: No questions.

(Witness excused.)

Mr. Greenstein: I have nothing further to present on the point of the issue.

Mr. Waddoups: May I have the Court's indulgence. Having shown Counsel the notation, your Honor, that appears on the records of our office, after the notation relative to the conference that has just been told the Court, there appears in our records a statement: "Conference with Greenstein and two 'phone calls." Then in brackets "He says Cadiente has abandoned sampan." I want the record to be clear that in that statement to me he made no statement as to when that abandonment had oc-

curred, but Mr. Greenstein, as I recall it from my recollection, did state that the sampan had been abandoned by his client, and that was in the late afternoon of June 13, 1949.

Mr. Greenstein: May I say, since we are going a little beyond the usual scope of examination and have gotten [163] into the inter-office matters, that I don't know the exact time, but just a few minutes elapsed before I had first met Mr. Cadiente who advised me he thought he needed a lawyer and would I please go to Mr. Waddoups' office, that when I did go up there I had no information as to what the matter was about, specifically, no information as to whether or not there had been an abandonment. At that time I had not seen a copy of the insurance policy. I believe that I asked Mr. Waddoups if he had a copy, and I think there was one which I inspected; and you mentioned, Mr. Waddoups, there was a charter party, and you let me examine it, and I advised you I would go back, Mr. Cadiente was coming back to my office. I think I did call you, as it reflected in your log, except I think I might have said he had already abandoned it, instead of the word "has."

There is, of course, in the record my letter of June 14, which I submit is a demand for payment under the policy rather than an attempt at a formal abandonment. The last paragraph of that letter may be important.

"You are again notified" that such loss occurred on such and such a date "and that said vessel has

been abandoned by the assured," referring in my mind to the previous, if any, abandonment by the owner.

I think we have nothing further on this, your Honor.

The Court: All right. [164]

Mr. Waddoups: We have nothing further to offer, your Honor. I think it is amply clear that the date on which Mr. Cadiente came in to see Mr. Matthew of the bonding and insurance agency and the date where he says that he told Mr. Matthew that there had been an abandonment has been set at the 13th, because Mr. Cadiente said that it was the same day that he went up to a meeting at our office, and not the 10th, as he has testified, as is further brought out by the fact that Mr. Andrews testified that the meeting was after the execution of the charter party, which was executed on Saturday, and the meeting was held the following week, so the earliest date would have been the 13th, the charter party being dated the 11th.

Would the Court like to hear from Mr. Matthew? He is out in the hall. We would like to clear this matter up and get the whole picture before the Court.

The Court: McAndrews testified—at least to the effcet, as I got it—that on the day he was in Mr. Waddoups' office at this conference, it was on that day that he was definitely told that the charterer's insurace company had no further directions to give, and on the afternoon of that day, about three or

four o'clock, he communicated with the master of the "Maizie C" which had the "Miss Philippine" in tow at sea somewhere. That is my understanding that he fixed the time when he notified the "Maizie C" that the charter party was all completed, no further directions or instructions.

Mr. Waddoups: That is correct, your Honor. He also testified that it was made amply plain in our conference with Cadiente that the insurance company was looking to him to complete salvage, and Cadiente was advised, and he was present at the conference at which these things developed.

The Court: That is the fact, then?

Mr. Waddoups: Yes, your Honor. We admit that.

The Court: On the 13th that the boat was out at sea?

Mr. Waddoups: Yes, your Honor, that is correct.

The Court: Well, of course you may call Mr. Matthew if you want to, but it was only that matter of the date I was interested in. I thought that the operations and the towing were earlier than the 13th, and the operations began a day, or was it two days before that?

Mr. Waddoups: I think the record will show that the charter party was entered into on the 11th. That required the time for the boat to go over.

The Court: Yes.

Mr. Waddoups: And I think the Court will recall that the log showed that they took her in tow on the 12th.

The Court: I am glad to have the additional testimony as to particulars, for whatever it may be worth. I don't know at this time what the outcome of the case will be in this court. I am not able at this time to say. I want to go over the record again with a little better understanding of just what transpired than I had as a result of the earlier hearing.

All right.

(Thereupon, at 11:10 a. m., March 27, 1950, an adjournment was taken in the above-entitled matter.)

CERTIFICATE

We, the official court reporters of the U. S. District Court, Honolulu, T. H., do hereby certify that the foregoing is a true and correct transcript of proceedings held in Admiralty No. 417, Fulgencia D. Cadiente, Libelant, versus The Indemnity Marine Assurance Company, Ltd., Respondent, held in the above-named court on January 16, 17, 18 and 19, and March 27, 1950, before the Hon. Delbert E. Metzger, Judge.

May 5, 1950.

/s/ ALBERT GRAIN,

/s/ LUCILLE HALLAM.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Hawaii.—ss:

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing record on appeal in the above-entitled cause, consists of the following listed original pleadings, transcript of proceedings, and exhibits:

Libel in Personam, Exhibit "A", Monition.

Answer.

Findings as Gleaned and Construed from Evidence.

Final Decree.

Bill of Costs.

Petition for Appeal and Order Allowing Appeal.

Bond on Appeal.

Citation on Appeal.

Assignments of Errors.

Appellant's Designation of Apostles on Appeal and Praecipe therefor.

Transcript of Proceedings—January 16, 17, 18, 19, and March 27, 1950.

Libelant's Exhibits "A," "B," "C," "D," "E," "F," "G," "H-1" to "H-5," inclusive, "I," "J," "K," and "L."

Respondent's Exhibits Nos. 1, 2, and 3.

I further certify that included in said record on appeal is a copy of the court minutes of January 16, 17, 18, 19, March 8 and 27, 1950.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court, this 8th day of June, 1950.

[Seal] /s/ WM. F. THOMPSON JR.,
Clerk.

[Endorsed]: No. 12574. United States Court of Appeals for the ninth circuit.
The Indemnity Marine Assurance Company, Ltd., Appellant, vs. Fulgencia D. Cadiente, Appellee. Apostles on Appeal. Appeal from the United States District Court for the District of Hawaii.

Filed June 12, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 12574

FULGENCIA D. CADIENTE,

Appellee,

vs.

THE INDEMNITY MARINE ASSURANCE COMPANY, LIMITED,

Appellant.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Comes now appellant, The Indemnity Marine Assurance Company, Limited, by Robertson, Castle & Anthony, its proctors, and in conformity with Rule 19 (6) of this Honorable Court hereby states that it intends to rely upon the following points:

I.

The insured sampan "Miss Philippine" was not a constructive total loss within the scope of the insurance policy sued upon when the appellee tendered her abandonment.

II.

Failure of the appellee to perform her duty to act for the defense, safeguard and recovery of the insured vessel bars her recovery upon the insurance policy.

III.

Acts of the appellant in recovering, saving and preserving the insured vessel did not constitute acceptance of her abandonment nor waive any defect in that abandonment by the appellee.

Dated: Honolulu, Hawaii, June 8th, 1950.

ROBERTSON, CASTLE & ANTHONY,

By /s/ THOMAS M. WADDOUPS,
Proctors for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 12, 1950.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF THE RECORD TO BE PRINTED

Comes now appellant, The Indemnity Marine Assurance Company, Limited, by Robertson, Castle & Anthony, its proctors, and in conformity with Rule 19 (6) of this Honorable Court hereby designates the following portions of the record to be printed:

1. Libel in personam, Exhibit "A" annexed thereto, and monition filed July 6, 1949;

2. Answer filed November 3, 1949;

3. Findings, conclusions and opinion filed April 19, 1950;

4. Final decree filed April 25, 1950;

5. Bill of costs filed April 25, 1950;

6. Petition for appeal and order allowing appeal filed May 5, 1950;

7. Bond on appeal filed May 5, 1950;

8. Citation on appeal;

9. Assignments of error proposed by Appellant;

10. Transcript of proceedings on trial;

11. Libellant's Exhibits "B," "I," "J," and "L";

12. Appellant's designation of apostles on appeal and praecipe therefor;

13. Certificate of Clerk.

Dated: Honolulu, Hawaii, June 8th, 1950.

ROBERTSON, CASTLE & ANTHONY,

By /s/ THOMAS M. WADDOUPS,
Proctors for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 12, 1950.

No. 12,574

IN THE

United States Court of Appeals

For the Ninth Circuit

THE INDEMNITY MARINE ASSURANCE COMPANY, LIMITED,

Appellant,

vs.

FULGENCIA D. CADIENTE,

Appellee.

Appeal from the United States District Court for the District of Hawaii.

BRIEF FOR APPELLANT.

THOMAS M. WADDOUPS,
ROBERT E. BROWN,
312 Castle & Cooke Building, Honolulu 1, Hawaii,
Proctors for Appellant.

ROBERTSON, CASTLE & ANTHONY,
312 Castle & Cooke Building, Honolulu 1, Hawaii,
Of Counsel.

Subject Index

Table of Authorities Cited

Miscellaneous

No. 12,574

IN THE

United States Court of Appeals

For the Ninth Circuit

THE INDEMNITY MARINE ASSURANCE COMPANY, LIMITED,
Appellant,

vs.

FULGENCIA D. CADIENTE,
Appellee.

Appeal from the United States District Court for the District of Hawaii.

BRIEF FOR APPELLANT.

OPINION BELOW.

The opinion of the District Court appears in the record at pages 13-23.

JURISDICTION.

This suit in admiralty to recover on a policy of marine insurance for the alleged constructive total loss of the insured vessel was commenced by the filing of a libel *in personam* in (R. 2-8), and issuance of monition from (R. 10-11), the United States District Court for the District of Hawaii against appellant. It involves matters within

the admiralty and maritime jurisdiction of said District Court. 28 U.S.C. Section 1333. A final decree was entered against appellant by said District Court on April 25, 1950 (R. 24-25), and appellant filed notice of appeal on May 5, 1950 (R. 27-28) in compliance with 28 U.S.C. Section 2107.

The jurisdiction of this Court of an appeal from the final decision of said District Court is conferred by 28 U.S.C. Sections 1291, 1294 and 41.

STATEMENT OF THE CASE.

Appellant, The Indemnity Marine Assurance Company, Limited, is an English corporation engaged in underwriting certain risks in the Territory of Hawaii through its general agent, The Bonding and Insurance Agency, Limited, a Hawaiian corporation. Both principal and agent will be referred to herein as the appellant except in connection with dealings *inter se.*

Fulgencia D. Cadiente, the appellee, is a citizen of the United States and was the registered owner of the sampan MISS PHILIPPINE at the time of the alleged loss (R. 44, 88). Her husband, Delesforo B. Cadiente, acted as her agent in all matters concerning the vessel (R. 91, 165). For simplicity's sake, both wife and husband will be termed the appellee herein.

In order to obtain a loan from the Bank of Hawaii secured by mortgage of the vessel, the appellee procured this policy from appellant insuring the vessel against the risk of total or constructive total loss only during one year from December 8, 1948 (R. 6, 46, 90).

MISS PHILIPPINE stranded on the rocky shore at Kaupo, Maui, on the morning of June 6, 1949 (R. 72). Her master notified the Coast Guard promptly of this incident; and that service relayed notice of the stranding to the appellee and dispatched a boat to the scene, where it was told that it could do nothing (R. 73, 76, 91). The master ordered his crew off the sampan and they remained on the nearby beach for several days awaiting instructions from the appellee (R. 77).

On the following day, Tuesday June 7th, the appellee flew to Maui and inspected the vessel in her stranded position at Kaupo (R. 92, 166). Having already been approached by Charles P. Hagood, master of the tug MAIZIE-C operated by King Limited, concerning the job of salvage, the appellee had taken Captain Hagood to Maui at his expense and directed to ascertain the feasibility of salvaging the vessel (R. 47, 62, 115). Captain Hagood chartered a small plane and, from a low altitude above MISS PHILIPPINE, studied the vessel's situation and satisfied himself that he could get her off into deep water with his tug (R. 63). After landing nearby he conferred with the appellee, who authorized him to proceed with the salvage operation; and he returned to Honolulu the same day to commence that job (R. 64, 117, 167).

Meanwhile, having learned of the stranding, the appellant engaged Mr. Frank H. Gallagher, a marine surveyor for the American Bureau of Shipping, to conduct a survey of the stranded sampan (R. 123-125). Mr. Gallagher first attended the vessel late in the afternoon of June 7th and found certain limited damage which he reported to appellant (R. 126-128). Upon the basis of these observed

conditions evaluated against his background of professional experience, he concluded that the vessel was completely salvageable—that she could be removed from the rocks and was worth the cost of repair (R. 129, 136). Appellant thereupon made written demand upon the appellee to proceed with salvage of the vessel in accordance with conditions of the policy (R. 111).

On Wednesday, June 8th, the appellee again examined the vessel and reached the opinion that he and his crew could not salvage her themselves because they had no equipment available; and he then sent the crew home and, through the Coast Guard, notified Captain Hagood not to come to Maui (R. 92-93, 108-109, 167-168). That afternoon the appellee returned to Honolulu and on the next morning, June 9th, personally confirmed to Captain Hagood his concellation of the salvage operation (R. 64, 176).

King Limited then approached appellant for the salvage job, representing that it could be done for $1500, and appellant's Honolulu agent secured from its mainland office the requisite authorization to expend that sum for salvage (R. 160). Appellant and King Limited entered an agreement whereby the latter, using its tug MAIZIE-C, was to undertake salvage of the stranded vessel at Kaupo under the direction of Mr. Gallagher as appellant's agent at that point; and appellant agreed to pay an hourly rate for the tug's services, with the express limitation of $1500 upon appellant's liability for salvage operations unless, when that sum was exhausted, appellant should authorize further expenditure (R. 156-158, 190). On Saturday, June 11th, a formal "charter party" embodying this agreement was executed (R. 79-83).

The tug MAIZIE-C set out from Honolulu on June 10, 1949, and arrived at Kaupo the next morning, Saturday (R. 50). Captain Hagood examined the stranded vessel, both from outside and aboard, and satisfied himself that he could pull her off the beach safely and tow her successfully (R. 51, 66). When Mr. Gallagher inspected the vessel that same day he found that racking due to motion of the surf had increased by about twenty per cent the damage observed on his previous attendance but that the sampan was still salvageable (R. 131). Through the joint efforts of the MAIZIE-C and a bulldozer and crew of men engaged by Mr. Gallagher, MISS PHILIPPINE was drawn off the rocks and floated into deep water on Sunday afternoon, June 12th (R. 52, 130).

Shortly thereafter the vessel capsized because the shifting of air-filled flotation bags placed inside her hull by Captain Hagood had raised her center of gravity too high for lateral stability (R. 66-67).

Although the charter party contemplated towing the sampan to Honolulu, Captain Hagood had been instructed by his company to deliver her into the nearest safe port, and to this end he had already arranged to put her in dry-dock at Kahului, Maui; but rather than risk losing his capsized tow in the rougher water of windward Maui, he proceeded down the leeward (south-west) coast toward Kaunakakai, Molokai, where she could be lifted out of the water for repairs (R. 53-56). The $1500 limit set by the charter party was reached when the tow was abeam Lahaina, Maui, but Captain Hagood considered the vessel valuable and continued towing her to the nearest safe port in the interests of whoever was then her owner (R.

68-70). Accordingly he moored her at Kaunakakai wharf early on the morning of June 14th, in no danger of further damage from wind or weather, and returned to Honolulu with the MAIZIE-C (R. 54).

Meanwhile on Monday morning, June 13th, the appellee told appellant that she was abandoning MISS PHILIPPINE (R. 175-176, 189, 192, 195-196); and the appellee having been advised to seek independent counsel, this notice was confirmed by her attorney later the same day (R. 198-199). At a meeting of the parties that morning of June 13th, King Limited made known that the vessel was then under tow on the high seas, advised that the funds invested in salvage by appellant had been exhausted, and requested further salvaging instructions; and appellant then made clear that it still looked to the appellee to salvage the vessel (R. 188-194). A subsequent meeting was held the same day, attended by appellee's attorney, at which King Limited reported the vessel's position, and appellant stated it had no further instructions for the salvor (R. 195).

Mr. Gallagher again examined the vessel in her capsized position at Kaunakakai on June 14th, accompanied by a representative of appellant, and with the aid of a crane had her rotated in the water and brought to an upright, buoyant position at the pier, where she was tied and left (R. 150-153, 160). Considering her condition at that point, he was of the opinion that MISS PHILIPPINE could have been towed to Honolulu and repaired for about $7,700 (R. 135-136).

By letter dated June 14, 1949, the appellee's attorney served formal notice of abandonment upon appellant and

demanded payment under the policy for a total loss (R. 103, 155). Appellant denied promptly and categorically that the vessel was a constructive total loss and that it had any responsibility for her disposition, advising further that the vessel was then tied safely at Kaunakakai pier and available to the appellee (R. 104-105). Neither party having asserted ownership and King Limited having relinquished any right it may have had to the vessel as salvor, she now rests in the possession of one Yamamoto at Kaunakakai (R. 57, 84, 87).

QUESTIONS PRESENTED.

I. Was the insured sampan MISS PHILIPPINE a constructive total loss within the scope of the insurance policy sued upon when the appellee tendered her abandonment?

II. Does failure of the appellee to perform her duty to act for the defense, safeguard and recovery of the insured vessel bar her recovery upon the insurance policy?

III. Did acts of appellant in recovering, saving and preserving the insured vessel constitute acceptance of abandonment or waive the defects in that abandonment by the appellee?

SPECIFICATION OF ERRORS.

The District Court erred in finding:

1. That on June 8, 1949, parts of the vessel's keel were carried away (R. 32);

2. That libelant-appellee decided on June 8, 1949, to abandon the vessel (R. 32);

3. That Mr. Cadiente asked the Coast Guard on June 8, 1949, to notify respondent-appellant of abandonment (R. 32);

4. That Mr. Cadiente told Captain Hagood on June 9, 1949, that he had abandoned the vessel (R. 33);

5. That after discussion with the vessel's builder on June 9, 1949, libelant-appellee was confirmed in the judgment and decision to abandon her (R. 33);

6. That libelant-appellee on June 10, 1949, told respondent-appellant and its attorney that she had abandoned the vessel (R. 33);

7. That respondent-appellant's attorney on June 10, 1949, told Mr. Cadiente to come back and bring his wife on June 13, 1949 (R. 34);

8. That before leaving Kaunakakai on June 14, 1949, Captain Hagood told Yamamoto that he could have the vessel if he moved it away from the wharf (R. 34);

9. That Captain Hagood testified that he would not have accepted the wreck as a gift (R. 35);

10. That the vessel's sponsons were crushed by respondent-appellant in righting the vessel at Kaunakakai Wharf (R. 35);

11. That neither party replied to a letter of King, Limited, dated July 16, 1949, stating that company's intention to cannibalize and destroy the vessel (R. 35);

12. That respondent-appellant questioned the right of libelant-appellee to refuse to take over the vessel at Kaunakakai (R. 35);

13. That respondent-appellant undertook to salvage the vessel after receiving notice of abandonment (R. 36);

14. That respondent-appellant abandoned the vessel at sea (R. 36).

15. The District Court erred in failing to conclude that the vessel, in either her stranded position or her righted position at Kaunakakai wharf on June 14th, could in all human probability have been recovered and repaired at a cost not exceeding $21,000 (R. 37).

16. The District Court erred in failing to conclude that at the time of abandonment the vessel was not a constructive total loss within the terms of the policy and that libelant-appellee had no right to abandon her and claim for a constructive total loss (R. 38).

17. The District Court erred in entering its final decree herein (R. 31).

18. The District Court erred in entering its "Findings as Gleaned and Construed From Evidence" (R. 31).

19. The District Court erred in finding that neither libelant-appellee nor her husband ever saw the policy sued upon or addendum thereto and were given no opportunity to read the same (R. 31).

20. The District Court erred in failing to conclude that under the policy sued upon no recovery could be had for constructive total loss of the vessel unless the expense of recovery and repairing the vessel exceeded $21,000 (R. 37).

21. The District Court erred in concluding that libelant-appellee was justified in abandoning the vessel and in

failing to conclude and decide that she abandoned without proper foundation that expense of recovering and repairing the vessel would exceed $21,000 (R. 37).

22. The District Court erred in failing to conclude that the policy sued upon required libelant-appellee to labor for the defense, safeguard and recovery of the vessel (R. 38).

23. The District Court erred in failing to find that libelant-appellee failed to make any reasonable, proper and practicable effort to save and conserve the vessel and in failing to conclude that such failure operated to bar her recovery for constructive total loss (R. 38).

24. The District Court erred in concluding that on June 14, 1949, respondent-appellant had no right to protect the vessel (R. 36).

25. The District Court erred in failing to conclude that the policy provided that no act of respondent-appellant in recovering, saving or preserving the vessel should be considered as an acceptance of abandonment and that the acts of respondent-appellant in procuring the salvage and recovery of the vessel did not constitute a constructive acceptance of abandonment (R. 39).

26. The District Court erred in concluding that libelant-appellee was entitled to recover upon the policy for constructive total loss of the vessel (R. 39).

SUMMARY OF ARGUMENT.

When the appellee gave notice of her abandonment to appellant, MISS PHILIPPINE was not a constructive total loss, which could arise only if the expense of recovering and repairing the vessel exceeded $21,000. The appellee did not introduce any evidence which would tend to show such expense, and the testimony of her own expert witness who actually salvaged the vessel disproved her claim that salvage was impracticable. Uncontradicted evidence adduced by appellant established the cost of recovering and repairing the vessel at somewwhat less than one-half of the sum stipulated in the policy as necessary to constitute a constructive total loss. The District Court could only support its conclusion that the appellee was entitled to abandon the vessel and recover on the policy by rejecting both the terms of the policy and general rules of law, by misstating undisputed facts and ignoring others, by relying upon irrelevant testimony for irrelevant findings, and by accepting without reservation the appellee's inexpert opinion despite its conflict with the opinion of qualified experts offered by both parties.

The appellee had an affirmative duty to act for the defense, safeguard and recovery of the insured vessel and failed to make the slightest effort to perform that duty, apparently content to await the vessel's eventual destruction on the rocks and surf.

No act of appellant in recovering, saving and preserving the vessel, undertaken after the appellee had failed to respond to its demand for salvage, can be construed as implied acceptance of the abandonment. Express provisions of the insurance policy granted to appellant the right

to so act without the risk of such conduct being considered an acceptance of abandonment; and such provisions, which protect all parties to insurance contracts and promote the public interest, should be given effect. In any event, the salvage of MISS PHILIPPINE was undertaken and effected successfully before the appellee tendered her abandonment to appellant, and appellant consistently refused to recognize any right to abandon.

ARGUMENT.

I. THE INSURED VESSEL WAS NOT A CONSTRUCTIVE TOTAL LOSS WHEN APPELLEE TENDERED HER ABANDONMENT.

A. CONSTRUCTIVE TOTAL LOSS ARISES ONLY WHEN EXPENSE OF RECOVERING AND REPAIRING THE VESSEL EXCEEDS $21,000.

As her sole ground for recovery, appellee alleged that the stranded vessel "did become a constructive total loss within the meaning and coverage of said marine insurance policy," which allegation appellant denied (R. 3, 12). This pleading placed squarely in issue the existence of a constructive total loss. With blithe disregard of the controlling terms of the insurance policy and established rules of law, the District Court concluded that appellee was justified in abandoning the vessel and held appellant liable upon the policy for a constructive total loss (R. 23). While many errors of fact and law inherent in this ruling will be treated subsequently, appellant has assigned specific error in this regard as follows:

16. That the District Court erred in entering its "Findings as Gleaned and Construed From Evidence."

19. That the District Court erred in finding that neither libelant-appellee nor her husband ever saw the policy sued upon or addendum thereto and were given no opportunity to read the same.

20. That the District Court erred in failing to conclude that under the policy sued upon no recovery could be had for constructive total loss of the vessel unless the expense of recovery and repairing the vessel exceeded $21,000.

21. That the District Court erred in concluding that libelant-appellee was justified in abandoning the vessel and in failing to conclude and decide that she abandoned without proper foundation that expense of recovering and repairing the vessel would exceed $21,000.

Quantum of Damage Necessary.

The doctrine of abandonment for constructive total loss, as distinguished from complete destruction or other irretrievable loss of property, is both ancient and well-established in the law of marine insurance.[1] In such a case the law deems the subject matter of insurance, though having a physical existence, as ceasing to exist for purposes of utility, and therefore subjects it to be treated as lost.[2] It is a constructive total loss if the thing insured

---

[1] *Marcardier v. Chesapeake Insurance Co.*, 8 Cranch 39 (U.S. 1814);
Marshall v. Delaware Insurance Co., 4 Cranch 202 (U.S. 1808);
Rhinelander v. Insurance Co. of Pennsylvania, 4 Cranch 29 (U.S. 1807);
See 2 *Arnold, Marine Insurance and Average*, Sec. 1091 (10th ed. 1921).

[2] *See Peele v. Merchants' Ins. Co.*, 19 Fed. Cas. No. 10,905, at 112 (C.C.Mass. 1822).

is lost for any beneficial purpose to the owner, who may then by seasonable tender abandon it to the underwriter and claim as for total loss.[3]

Under the settled common law of this country, a constructive total loss justifying abandonment exists where the damage sustained by the insured property—in the case of a vessel, the expense of repairing her—exceeds fifty per cent of its agreed or repaired value.[4] As early as 1822 one distinguished federal jurist stated:[5]

> . . . it is so well established by the general current of authority that it may be considered as a fixed rule, that if the ship be injured by perils insured against, so as to require repairs to the extent of more than half her value, the insured is entitled to abandon as for a total loss.

The English rule differs in requiring the cost of salvage and repairs to exceed the full value of the vessel in order

---

[3] *Standard Marine Ins. Co. v. Nome Beach L. & T. Co.*, 133 Fed. 636 (C.C.A. 9th 1904);
Bullard v. Roger Williams Ins. Co., 4 Fed. Cas. 643, No. 2,122 (C.C.R.I. 1852);
See 3 *Kent Comm.* *318.

[4] *Washburn & Moen Mfg. Co. v. Reliance Ins. Co.*, 179 U.S. 1 (1900);
Oriental Insurance Co. v. Adams, 123 U.S. 67 (1887);
Patapsco Insurance Co. v. Southgate, 5 Peters 604 (U.S. 1831);
Jeffcott v. Aetna Ins. Co., 129 F. (2d) 582 (C.C.A. 2d 1942);
Royal Exch. Assur. v. Graham & Morton Transp. Co., 166 Fed. 32 (C.C.A. 7th 1908);
St. Paul Fire & Marine Ins. Co. v. Beacham, 128 Md. 414, 97 Atl. 708 (1916);
See 6 *Appleman, Insurance Law and Practice*, Sec. 3704 *et seq.* (1942).

[5] Mr. Justice Story in *Peele v. Merchants' Ins. Co.*, *supra* note 2, at 113.

to constitute a constructive total loss.[6] In both England and America, however, it is clear that the policy of insurance itself may effectively limit the right to abandon and claim a constructive total loss by providing that the expense of repairs shall exceed a specified value, and such contractual provisions govern the assured's right of recovery for constructive total loss.[7]

This Court has itself said with respect to a claim for constructive total loss under a policy of marine insurance:[8]

> Every case depends upon its own particular facts, and upon the terms and provisions of the particular policy of the insurance in question.

Again, concerning limitations upon the assured's right to abandon, it stated:[9]

> Parties must be governed by the terms of the contract which they have entered into, and are not bound by the rules which apply to other and different kinds of contracts.

And further, carrying this elementary principle to its logical end:[10]

---

[6] *Marine Insurance Act of 1906* (6 Edw. VII ch. 41), Sec. 60. *See Heebner v. Eagle Ins. Co.*, 76 Mass. 131, 69 Am. Dec. 308 (1857).

[7] *Wallace v. Thames & Mersey Ins. Co.*, 22 Fed. 66 (C.C.E.D. Mich. 1884);
Bullard v. Roger Williams Ins. Co., *supra* note 3;
Howell v. Philadelphia Mut. Ins. Co., 12 Fed. Cas. 706, No. 6,781 (C.C.Md. 1851).
The English Marine Insurance Act of 1906, *supra* note 6, is explicit in this regard, making its definition of a constructive total loss "Subject to any express provision in the policy . . ."

[8] *Soelberg v. Western Assur. Co.*, 119 Fed. 23, 29 (C.C.A. 9th 1902).

[9] *Id.* at 30.

[10] *Id.* at 31.

> In order to entitle the plaintiffs to recover it is essential for them, by competent proof, to show a loss which comes within the terms of their policy of insurance. They must bring their case within the provisions of the contract for insurance. They are bound by the lawful agreements and stipulations therein contained, and must satisfactorily prove a loss. The burden is, of course, upon them to establish their right to recover. This general principle is supported by abundant authority.

Support is hardly needed for this proposition that one who seeks to enforce a contract of insurance is bound by the terms thereof, although examples of its application are readily at hand. In one analogous instance a policy provided:

> No recovery for a constructive total loss shall be had hereunder, unless the expense of recovering and repairing the vessel shall exceed the insured value

which value was established by the policy at $85,000. The District Court, quoted with approval by the Circuit Court of Appeals for the Third Circuit in affirming *per curiam*,[11] ruled that under this provision, if the sunken vessel could have been raised and repaired at a cost of less than $85,000, the assured had no right to claim a constructive total loss, there being no reason why an insurance policy should not contain limitations upon the right to abandon and recover for such a loss.

Another policy under which an assured claimed for constructive total loss provided:

---

[11] *Klein v. Globe & Rutgers Fire Ins. Co.*, 2 F. (2d) 137 (C.C.A. 3d 1924).

> No abandonment shall in any case be effectual unless the amount of the loss exceeds 75 per cent. of the combined value in this policy as set forth above.

By means of a further stipulation in the policy this value was set at $100,000 for purposes of claiming total loss. Accordingly, it was held that loss must exceed $75,000 to make an abandonment effectual.[12]

In still another case,[13] an assured sued upon the theory of constructive total loss under a policy providing that—

> There shall be no abandonment as for a constructive total loss . . . unless the cost of necessary repairs . . . be equivalent to 75 per cent. of the agreed value of the vessel as specified herein.

Agreed value was specified as $3,000. Finding that the policy itself thus defined a constructive total loss to be such damage as to make necessary repairs costing at least 75 per cent of $3,000, the court said:[14]

> The clause in the insurance policy which enables him to make an abandonment in a proper case, and determining the conditions under which the abandonment may be made, is just as much a part of the insurance policy as any other stipulation or condition contained in the policy.

This policy of insurance contains just such limitations upon recovery for constructive total loss, reading as follows:

---

[12] *Chicago S.S. Lines v. United States Lloyds*, 2 F. (2d) 767 (N.D. Ill. 1924), *aff'd* 12 F. (2d) 733 (C.C.A. 7th 1926).
[13] *Searles v. Western Assur. Co.*, 88 Miss. 260, 40 So. 866 (1906).
[14] *Ibid.*, 40 So. at 869.

> No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovering and repairing the Vessel shall exceed the insured value. (R. 7)
>
> In ascertaining whether the vessel is a Constructive Total Loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account. (R. 7, 8)
>
> Notwithstanding anything herein contained to the contrary, it is mutually understood and agreed that in ascertaining whether the vessel is a Constructive Total Loss, $21,000.00 shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account. (R. 9)

Integrated and reduced to their lowest common denominator, the foregoing terms simply define a constructive total loss, upon the occurrence of which the assured is entitled to abandon the insured sampan to the underwriter and recover the policy's face value, as that injured condition of the vessel in which the expense of recovering and repairing her shall exceed the sum of $21,000. These provisions were absolutely determinative of the appellee's right to abandon the vessel and recover for constructive total loss. They imposed upon her the burden of proving that damage to MISS PHILIPPINE exceeded $21,000.

Scant recognition of this express condition upon recovery was given by the trial court in its decision, a rambling chronology entitled "Findings as Gleaned and Construed from Evidence," and even that passing reference

was couched in terms calculated to sap its vitality. It was there stated that neither the libelant (appellee) nor her husband ever saw the policy, that they were given no opportunity to read it, and that the policy and its terms were in no manner explained to either of them (R. 14). The irrelevancy of these findings is self-evident, as such facts could become material only if the appellee were seeking to avoid the policy. Appellee's proctor denied entertaining such a theory (R. 183); and he could hardly attack the validity of the contract consistently with his suit to enforce it.

That appellee procured this policy in order to borrow money from the Bank of Hawaii upon the security of her sampan (R. 89-90, 178) explains why she may not have received custody of the policy until that mortgagee had waived claim thereunder (R. 6, 46), but the relevancy of these facts escapes detection. The court might with equal pertinency have observed that nothing prevented the appellee, during some six months between the policy's issuance and the vessel's stranding, from inspecting and reading the policy in the hands of her agent, the bank, or from soliciting from any source advice in arranging suitable insurance coverage or full explanation of the protection afforded by this particular policy. On this latter point, it would have been a fair inference that the appellee knew what she was getting when she changed from her earlier high-premium insurance to this three-per-cent policy against total loss only (R. 179). We deem all such factors as irrelevant to the real issue as these objectionable findings, yet they have equal foundation in the record

and merit like consideration if a trial court is to indulge in irrelevancies as the basis for its decision.

Careful reading of this decision leaves the firm conviction that the court below, having found that the assured had no knowledge of the policy's limitations upon recovery for constructive total loss, summarily dismissed those provisions from further consideration. At no other point in the decision are they even mentioned, nor does the court undertake to define what would constitute a constructive total loss under this policy. What magic formula was employed in concluding that the appellee's abandonment of the vessel was justified remains undisclosed.

To similar disregard urged with respect to such stipulations contained in a marine policy, another federal court has given the complete refutation:[15]

> If the assured did not know that such a warranty was to be found in the policy, it was because he did not take the trouble to read it. We find it in the policy and it is as much a part of the contract as any other, and is as binding on the parties as any other.

This implicit rejection of the controlling terms of the policy sued upon was clear error.

Certainty of Damage Necessary.

The mere stranding or submersion of a vessel does not of itself furnish sufficient ground for abandonment, as that right depends upon all attendant circumstances of

---

[15] *Levi v. New Orleans Mut. Ins. Ass'n*, 15 Fed. Cas. No. 8,290, at 420-421 (C.C. La. 1874).

each case as well as the terms of the insurance contract involved; and on frequent occasion it has been held that an owner claiming for constructive total loss was not justified in abandoning his stranded or sunken vessel under the circumstances which prevailed at the time of abandonment.[16] In general, these cases merely illustrate failure of the assured to prove his loss to lie within the terms of his policy.

This policy of insurance establishes the quantum of damage which will justify abandonment for constructive total loss, namely, expense of recovery and repair exceeding $21,000. In any case falling short of absolute total loss, however, it seems unlikely that either owner or underwriter could know beyond any doubt the extent of actual injury sustained without completely recovering and repairing the vessel. How certain, then, must be this measure of damage to justify abandonment and permit recovery as for total loss?

Chancellor Kent gave to our early law this classic statement of the guiding principle involved:[17]

> The right of abandonment does not depend upon the certainty, but upon the high probability of a total

---

[16] *E.g., Klein v. Globe & Rutgers Fire Ins. Co., supra* note 11; *Chicago S.S. Lines v. United States Lloyds, supra* note 12; *Copeland v. Phoenix Ins. Co.*, 6 Fed. Cas. 507, No. 3,210 (C.C. Mo. 1868), *aff'd on other grounds sub nom. Copelin v. Insurance Co.*, 9 Wallace 461 (U.S. 1869); *Searles v. Western Assur. Co., supra* note 13. *Reynolds v. Ocean Ins. Co.*, 22 Pick. 191, 33 Am. Dec. 727 (Mass. 1839); *Bosley v. Chesapeake Ins. Co.*, 3 Gill & J. 450, 22 Am. Dec. 337 (Md. 1831); *Wood v. Lincoln & Kennebeck Ins. Co.*, 6 Mass. 479, 4 Am. Dec. 163 (1810).

[17] 3 *Kent Comm.* *321.

> loss, either of the property, or voyage, or both. The insured is to act, not upon certainties, but upon probabilities; and if the facts present a case of extreme hazard, and of probable expense, exceeding half the value of the ship, the insured may abandon, though it should happen that she was afterwards recovered at a less expense.

Known today as the "high probability rule," this doctrine has enjoyed wide application in determining whether the right to abandon existed under particular circumstances. Mr. Justice Story, speaking for the Supreme Court in reviewing the case of a stranded brig, quoted the rule with approval and further stated:[18]

> In many cases of stranding, the state of the vessel at the time may be such, from the imminency of the peril, and the apparent extent of expenditures required to deliver her from it, as to justify an abandonment; although by some fortunate occurrence, she may be delivered from her peril without an actual expenditure of one-half of her value after she is in safety. Under such circumstances, *if, in all human probability, the expenditures which must be incurred to deliver her from her peril, are, at the time, so far as any reasonable calculations can be made, in the highest degree of probability,* beyond half value; and if her distress and peril be such as would induce a considerable owner, uninsured, and upon the spot, to withhold any attempt to get the vessel off, because of such apparently great expenditures, the abandonment would doubtless be good. (Emphasis supplied).

---

[18] *Bradlie v. Maryland Insurance Co.*, 12 Peters 378, 398 (U.S. 1838);
Accord, Orient Insurance Co. v. Adams and *Royal Exch. Assur. v. Graham & Morton Transp. Co., supra* note 4.

These remarks were addressed to the proposition that, the distressed vessel having been recovered and repaired, actual expense thereof formed the only criterion of the owner's right to recover for constructive total loss. While conceding that the cost of subsequent repairs affords one of the best proofs of actual damage, the Court declined to make it absolutely decisive and expressly approved this instruction given by the circuit court, under which the jury had denied any award for total loss:[19]

> . . . if the jury find that the vessel could have been got off and repaired, without an expenditure of money to the amount of more than half her value, then upon the evidence offered, the plaintiffs are not entitled to recover for a total loss . . .

It is instructive to consider several more recent cases applying this rule. In *Chicago S.S. Lines v. United States Lloyds*,[20] where the insured steamer had sunk at her dock, been abandoned by the assured, and was raised promptly by the underwriter, the court ruled that loss must exceed the policy limit of $75,000—either actually or in high probability—in order to justify the abandonment, saying:[21]

> He is not entitled, without investigation, and without due foundation of fact or extreme probability of fact, to throw the burden upon the insurers.

After reviewing all expert opinion on the cost of recovering and repairing the vessel, none of which reached the

---

[19] *Id.* at 395, 400. Instructions substantially similar were approved in *Patapsco Insurance Co. v. Southgate* and *Orient Insurance Co. v. Adams, supra* note 4.

[20] *See* note 12 *supra*, 2 F. (2d) 767.

[21] *Id.* at 770.

sum of $75,000, the court concluded that there was no high probability of such damage as to warrant abandonment for a constructive total loss. Upon appeal, the Circuit Court of Appeals for the Seventh Circuit considered that expert testimony, as well as the fact that the salvor had bid only $5,500 to raise the vessel and place it alongside the dock, and held that the great preponderance of evidence showed that there was at no time a high probability of constructive total loss.[22]

An extremely lucid interpretation of the rule was given by the trial court in *Klein v. Globe & Rutgers Fire Ins. Co.*[23] as to the right of an assured:

> . . . he is not entitled, without investigation and without due foundation of fact or extreme probability of fact, to place the entire burden upon the insurer by an abandonment. He must determine for himself whether he has the right to abandon. If he is able to show that the cost of restoring the vessel, 'so far as any reasonable calculations can be made', would exceed the amount which would constitute it a constructive total loss, he is safe in abandoning it; but it must be remembered the existence of the fact that it would so exceed the amount, constituting a constructive total loss, is the criterion of his right to abandon.

In that case an insured river-boat sank in some thirty-three feet of water of the Mississippi River, from which she undoubtedly could have been raised and repaired if she had not broken upon sinking. Whereas the underwriter had the sunken boat examined twice by divers, who testified that they found her intact, the owner neglected

---

[22]*See* note 12 *supra*, 12 F. (2d) at 738.
[23]*See* note 11 *supra*, 2 F. (2d) at 141-142.

to have such expert examination made and relied upon general opinion testimony to show breakage circumstantially. Commenting that such neglect was not the conduct of a considerate owner, uninsured, the court concluded that the boat could have been restored for less than $85,000—the limitation fixed by the policy in question—and therefore the assured was not entitled to abandon her and recover for a constructive total loss. In affirming this decision, the appellate court ruled that the assured had not borne the burden of showing that his loss was total.[24]

The so-called "high probability rule" appears to receive as equable credit modernly as accorded it over a century ago,[25] excepting only where it is deemed displaced by contractual terms restricting abandonment to certain conditions. In one instance a circuit court said of such terms:[26]

> The right of abandonment is made to depend upon the result, and not upon a calculation of probabilities. No right to abandon is admitted when the loss is not strictly and technically an actual total loss, unless, as it turns out, the expense of restoration exceeds one-half the value.

And this Court has also indicated[27] that such provisions leave no room for the "high probability rule"—that actuality rather than high probability of excessive expense

---

[24] *Id.* at 144.

[25] *Jeffcott v. Aetna Ins. Co., supra* note 4, 129 F. (2d) 582.

[26] *Wallace v. Thames & Mersey Ins. Co., supra* note 7, 22 Fed. at 70.

[27] *Fireman's Fund Ins. Co. v. Globe Nav. Co.*, 236 Fed. 618, 635 (C.C.A. 9th 1916); *Soelberg v. Western Assur. Co., supra* note 8, 119 Fed. 23.

must then determine the right to recover for constructive total loss.

Thus the policy's limitations on abandonment are taken to define the quality of proof by which the specified quantum of damage must be shown, requiring that an assured who would recover for a technical total loss establish actual expense of recovering and repairing his vessel exceeding such amount, not merely the highest probability of costs in that sum had recovery and reparation been undertaken. However, we find it unnecessary to dwell on this point since, just as in the cases cited above,[28] this appellee has made no attempt to carry even the lesser burden of proof imposed by the "high probability rule."

It is appellant's thesis here that the court below, having already chosen to ignore the paramount limitations upon recovery as fixed by this policy of insurance, also rejected the only settled rule of law which could govern the right of abandonment and recovery. It concluded expressly that the "human probabilities rule" was not of value in the facts of this case (R. 22), thus leaving to conjecture the equation by which it held the appellee's abandonment justified and appellant liable for a constructive total loss under the policy. This was manifest error of law under all authorities treating of abandonment for constructive total loss.

We can only deplore such decision by intuition. It disturbs principles nurtured on centuries of commerce and, not the least here, imposes upon this appellant an obliga-

---

[28] *Ibid.*

tion not assumed by its lawful contract. Had the trial court given due effect to the policy's terms and the established rules governing abandonment, it could only have supported its decision on the ultimate issue of recovery by concluding that expense of recovering and repairing MISS PHILIPPINE, in her condition when abandonment was tendered, would—"in all human probability," "in extreme probability of fact," and "so far as reasonable calculations could be made"—exceed $21,000. No such conclusion was reached, nor does the decision contain findings upon which it might be predicated; nor, indeed, would the evidence warrant such findings and conclusion.

B. NUMEROUS FINDINGS OF FACT WERE CLEARLY ERRONEOUS.

Appellant urges no error in the admission or exclusion of evidence but only in what the court below did with that evidence. In numerous respects the findings filed in support of its decision are so unsupported by any competent evidence, so far at variance with the obvious weight of evidence or with undisputed facts, so irrelevant and misleading, or so patently slanted to lend substance to a claim otherwise without foundation in the record, as to merit the attention of this Court on appeal.

In raising these factual questions we are not unmindful of the salutary rule that, where a substantial part of the evidence was heard in open court, findings of the trial court are accompanied with the rebuttable presumption of correctness[29] and should not be disturbed unless clearly erroneous as against the weight or preponderance of the

[29] *The Pennsylvanian*, 139 F. (2d) 478 (C.C.A. 9th 1943).

evidence.[30] The rule's corollary, of course, is that such findings are clearly wrong and cannot stand unless supported by substantial evidence.[31] Findings of fact required in admiralty[32] also must not be discursive nor state the evidence or any of the reasoning thereon but should be categorical and confined to those propositions of fact which fit upon the relevant propositions of law,[33] a principle ignored by the court below. We believe that upon this trial *de novo*[34] this Court, in weighing the evidence of record and making its independent "examination, thought and judgment"[35] thereof, will find clearly erroneous and will correct the following findings of the District Court:

1. That on June 8, 1949, parts of the vessel's keel were carried away.

This is hardly an instance of conflicting evidence, since the expert witnesses produced by both parties were in complete accord as to the intact condition of the vessel's keel on the strand (R. 66, 127). Obviously striving to justify his cancellation of salvage and subsequent inaction on behalf of the vessel, Mr. Cadiente stated repeatedly that her keel was all gone or almost gone (R. 92, 107, 167,

---

[30] *Drain v. Shipowners & Merchants Tugboat Co.*, 149 F. (2d) 845 (C.C.A. 9th 1945); Rule 52(a), *Federal Rules of Civil Procedure.*

[31] *Cf. Bornhurst v. United States*, 164 F. (2d) 789 (C.C.A. 9th 1947); *Stetson v. United States*, 155 F. (2d) 359 (C.C.A. 9th 1946), and cases there cited.

[32] Admiralty Rule 46½, 28 U.S.C.A. following Sec. 2073 (formerly Sec. 723).

[33] *Petterson Lighterage & Towing Corp. v. New York Central R. Co.*, 126 F. (2d) 992 (C.C.A. 2d 1942).

[34] *Ibid.; Drain v. Shipowners & Merchants Tugboat Co., supra* note 30.

[35] *The Ernest H. Meyer*, 84 F. (2d) 496 (C.C.A. 9th 1936).

173), implying that the wooden sampan could therefore not be saved. Such repetition apparently impressed the trial court, although the witness himself conceded that he had little opportunity to observe that condition of the vessel (R. 120). Hence this finding, predicated upon inexpert and speculative testimony, stands without substantial foundation in the record.

2. That libelant-appellee decided on June 8, 1949, to abandon the vessel.

This finding (R. 16) is objectionable as being wholly irrelevant and based upon the uncorroborated testimony of Mr. Cadiente himself (R. 92). He was not even consistent, indicating at one point that he made up his mind the next day after returning to Honolulu (R. 170). Significantly, the court itself recognized upon appellant's objections that what he was thinking could not bind the appellant in any manner (R. 167, 168).

Technical abandonment, without which there can be no such thing as a constructive total loss,[36] is neither the act of leaving a vessel unattended in its distress nor the subjective intent to give her up as lost; rather, it consists of the objective manifestation of such intention by the owner's surrender of his interest to the underwriter. Sufficiency of an abandonment rests not merely on the occurrence of justifying facts but upon their knowledge by the assured and communication thereof to the underwriter,

---

[36] *Klein v. Globe & Rutgers Fire Ins. Co., supra* note 11, 2 F. (2d) 137; *Standard Marine Ins. Co. v. Nome Beach L. & T. Co., supra* note 3, 133 Fed. 636.

with an offer to abandon.[37] No particular form of abandonment has been prescribed by law, but unequivocal notice thereof must be given to the insurer or there can be no recovery as for total loss.[38] The following language of the Supreme Court as to the character of such notice has become the established rule:[39]

> It seems, however, agreed that no particular form is necessary, nor is it indispensable that it should be in writing. But, in whatever mode or form it is made, it ought to be explicit, and not left open as matter of inference from some equivocal acts. The assured must yield up to the underwriter all his right, title, and interest in the subject insured.

Notice there must be, and its tender to the underwriter constitutes the abandonment. The appellee's mental processes and decisions are therefore of no moment here, and any finding thereon and inference therefrom must be disregarded as immaterial to the issue at bar.

---

[37] *Bullard v. Roger Williams Ins. Co., supra* note 3, 4 Fed. Cas. 643, No. 2,122; *King v. Delaware Ins. Co.*, 14 Fed. Cas. 516, No. 7,788 (C.C. Pa. 1808); *Hilton v. Federal Ins. Co.*, 118 Cal. App. 495, 5 P. (2d) 648 (1931); *Gomila v. Hibernia Ins. Co.*, 40 La. App. 553, 4 So. 490 (1888); *Thomas v. Rockland Ins. Co.*, 45 Me. 116 (1858); *Heebner v. Eagle Ins. Co., supra* note 6, 76 Mass. 131, 69 Am. Dec. 308; *Smith v. Manufacturers' Ins. Co.*, 48 Mass. 448 (1844); *Bosley v. Chesapeake Ins. Co., supra* note 16, 3 Gill & J. 450, 22 Am. Dec. 337.

[38] *Ibid.*

[39] *Patapsco Insurance Co. v. Southgate, supra* note 4, 5 Peters at 622; *accord, Chicago S.S. Lines v. United States Lloyds, supra* note 12, 12 F. (2d) 733 (no proper notice of abandonment given).

3. That Mr. Cadiente asked the Coast Guard on June 8, 1949, to notify respondent-appellant of abandonment.

This finding appears unsupported by even the testimony of Mr. Cadiente (R. 109, 168), but is rather an assumption propounded by the court upon trial (R. 172) and perpetuated in its decision (R. 16). And, had this witness so testified, it would have been mere hearsay repetition of self-serving statements. Such a finding was clearly wrong.

4. That Mr. Cadiente told Captain Hagood on June 9, 1949, that he had abandoned the vessel.

Both the testimony (R. 176) and finding (R. 16) on this point are irrelevant, since only the owner's notification to the underwriter will effect an abandonment.[40] It is undisputed that at the time of this statement, Captain Hagood was merely an employee of King Limited with whom the appellee had contracted for salvage of the vessel (R. 47, 64). There is no suggestion, nor could there be, that notification to the appellee's own agent amounted to tender of abandonment to the appellant.

5. That after discussion with the vessel's builder on June 9, 1949, libelant-appellee was confirmed in the judgment and decision to abandon her.

Mr. Cadiente sought to justify the abandonment as proper by testifying that upon his return to Honolulu he consulted the vessel's builder, explained to him the condition of the sampan, and solicited his advice (R. 169).

---

[40] *See* assignment No. 2 *supra*.

However, as appellant's proctor objected at this point in the trial, his testimony as to the boat-builder's advice would be hearsay evidence. The trial court sustained this objection, ruling that what the boat-builder told that witness must come from the boat-builder (R. 170). Moreover, it was apparent that any opinion which might have been expressed by Mr. Tanimura, the boat-builder, was based not upon his personal observation but upon Mr. Cadiente's own description of the vessel's condition.

Thus the trial court in making this finding (R. 17) not only ignored its own evidentiary ruling but compounded its error by giving credit to hearsay advice rendered upon hearsay description; and, indeed, it went beyond the record in necessarily assuming the nature of that advice, a matter not in evidence.

6. That libelant-appellee on June 10, 1499, told respondent-appellant and its attorney that she had abandoned the vessel.

Mr. Cadiente testified that on June 10th he called at appellant's office and notified its representative, Mr. Matthew, that he was abandoning the sampan; and he was positive in asserting that on the same morning he attended a conference in the office of appellant's attorney, at which he gave the same notice (R. 174-176). However, the date of that conference was established beyond doubt as June 13th by the testimony of appellee's own witness, Mr. McAndrews of King Limited (R. 188-189, 192-195), and by stipulation of appellee's proctor made in open court (R. 196-198). Such admissions of fact by an attorney upon

hearing are, of course, binding upon his client's case.[41] Thus the record shows conclusively that the appellee tendered abandonment of MISS PHILIPPINE when, to the knowledge of both parties, she was in tow on the high seas (R. 191).

We stress the importance of accuracy in fixing the date of abandonment because the state of facts actually existing at that time determines the assured's right to abandon and claim for constructive total loss.[42] Unless the vessel had at that point in time sustained such injury that the expense of her recovery and repair would exceed $21,000, appellee had no right to abandon.[43]

7. That respondent-appellant's attorney on June 10, 1949, told Mr. Cadiente to come back and bring his wife on June 13, 1949.

Nothing in the record supports this finding (R. 17), and it is but another example of the liberties taken by the trial court with the evidence in this case (R. 193).

8. That before leaving Kaunakakai on June 14, 1949, Captain Hagood told Yamamoto that he could have the vessel if he moved it away from the wharf.

Here again the court's finding (R. 21) is absolutely without foundation in the record. Presumably it infers

---

[41] *Oscanyan v. Winchester Repeating Arms Co.*, 103 U.S. 261 (1880); *O. F. Nelson & Co. v. United States*, 149 F. (2d) 692 (C.C.A. 9th 1945); *New York Evening Post Co. v. Chaloner*, 265 Fed. 204 (C.C.A. 2d 1920).

[42] *Rhinelander v. Insurance Co. of Pennsylvania, supra* note 1, 4 Cranch 29; *Marshall v. Delaware Insurance Co., supra* note 1, 4 Cranch 202; *Bradlie v. Maryland Insurance Co., supra* note 18, 12 Peters 378; *Orient Insurance Co. v. Adams, supra* note 4, 123 U.S. 67.

[43] *See* part I. A *supra.*

that, had the salvor made such a statement to his friend, he must then have considered the vessel worthless—an inference contradicted by his stated opinion that the vessel still had some value (R. 70). The trial court not only went outside the evidence in attributing to Captain Hagood this statement which admittedly did not appear in his testimony (R. 20-21) but also erred gravely in fixing June 14th as the time of the conversation with Yamamoto. Hagood testified to his arrival at Kaunakakai early that morning, and that as soon as he made the vessel fast to the dock he got under way to Honolulu (R. 54), and that he contacted Mr. Yamamoto on September 30th (R. 57).

As a matter of record, the appellee's evidence from the mouth of Mr. McAndrews discloses that King Limited did not give Yamamoto authority to take possession of the vessel but merely relinquished any right against her for salvage (R. 87).

9. That Captain Hagood testified that he would not have accepted the wreck as a gift.

The error inherent in this finding (R. 21) lies in the court's relation of this testimony to Captain Hagood's towing of the vessel into Kaunakakai harbor on June 14, 1949, rather than to an examination made by him almost four months later. Hagood described her condition on September 30th, at which time she was raised on blocks in the back yard of Mr. Yamamoto, with her engine removed, pilot house and cabin taken off, planking stripped off, and hull pierced in order to support her on the blocks (R. 57). He also noted that considerable damage had been

inflicted by Yamamoto in removing her from the water and that marine worms were then attacking her hull (R. 57-58), concluding—

> I wouldn't have taken it as a gift at that point. (R. 58).

Even if this finding had been correctly oriented in time, it would still remain wholly irrelevant to the issue of whether the vessel was a constructive total loss when abandoned on June 13th,[44] a truism which the trial court refused to recognize (R. 58-59) until the appellee offered evidence of the vessel's condition on December 2, 1949 (R. 98-100).

> 10. That the vessel's sponsons were crushed by respondent-appellant in righting the vessel at Kaunakakai Wharf.

By this finding (R. 21) the trial court held that appellant's acts of saving and preserving the vessel damaged her further, yet the uncontradicted testimony of experts for both parties is to the contrary.

Captain Hagood stated that the sponsons had been crushed by the wire rope slings which Yamamoto had passed around the hull of the vessel in order to lift her to the dock by crane (R. 57-58). Mr. Gallagher, who supervised the righting of the capsized sampan, testified that Manila rope rather than wire had been used to rotate her, in order to avoid inflicting injury in the process (R. 152). And in response to direct questions from the bench, he said that the vessel's walls had not been crushed by the

---

[44] *See* assignment No. 6 *supra*.

pressure of the hawser around her, but that such injury might have occurred in removing her from the water (R. 153-154). There is no evidence that damage of this nature would necessarily be sustained by the vessel in the course of reparation.

11. That neither party replied to a letter of King Limited dated July 16, 1949, stating that company's intention to cannibalize and destroy the vessel.

The letter to which this finding refers (R. 21) does not appear in evidence, although the appellee attempted to introduce such a letter and was met by appellant's objection to its relevancy (R. 85-87). Neither party reached the point of showing any reply. The court thus went beyond the record in making this finding and drawing any inference therefrom.

12. That respondent-appellant questioned the right of libelant-appellee to refuse to take over the vessel at Kaunakakai.

This statement (R. 21) by the court below reflects a basic misconception of the only issue here involved: the right of appellee to recover for a constructive total loss of her sampan (R. 3, 12). Appellant never questioned the right of the appellee to refuse the vessel after salvage, or to throw away any of her other property, but consistently took the position that the vessel was her responsibility. Its letter dated June 17th to appellee's attorney, wherein appellant advised that the sampan was tied in a righted position at Kaunakakai pier and still owned by the appellee, speaks for itself (R. 104-105).

13. That respondent-appellant undertook to salvage the vessel after receiving notice of abandonment.

Failure of the court to make accurate determination of the time of abandonment, as fixed by undisputed testimony and stipulation,[45] resulted in this erroneous finding (R. 21-22). Chronologically, appellant undertook to save the vessel only after her owner had failed to make any effort toward that end,[46] despite demand made upon her (R. 111), and the vessel had already been successfully removed from the rocks and was under tow by the salvor when appellant became apprised of the assured's intention to abandon.

14. That respondent-appellant abandoned the vessel at sea.

In reaching its ultimate conclusion, the court below appeared to rely heavily on what it characterized as appellant's "abandonment" of the vessel at sea on June 13th, as not only constituting constructive acceptance of the owner's abandonment but also indicating appellant's belief that salvage was hopeless (R. 22, 23). Obviously the court spoke of abandonment in the colloquial rather than technical sense of marine insurance. However defined, that label was erroneously attached to appellant's refusal to commit more money toward financing salvage after the appellee had tendered abandonment of MISS PHILIPPINE.

While the rescued vessel was under tow along the leeward side of Maui on June 13th, the appellee first gave

---

[45] *See* assignment No. 6 *supra*.
[46] *See* part II *infra*.

notice of abandonment to appellant, as a result of which several meetings were held that same day amongst all three parties then concerned.[47] At the first of these meetings appellant emphasized that it still looked to the appellee to salvage the vessel and urged her to seek independent counsel (R. 189), thus rejecting her abandonment; and King Limited disclosed that it had exhausted the $1500 which appellant had contributed toward salvage, had the vessel in tow on the high seas, and desired to know whether appellant would spend any more money on salvage (R. 190-193). At the subsequent meeting, attended by appellee's attorney, Mr. McAndrews of King Limited reported the position of the tow and was informed that appellant had no further instructions concerning salvage (R. 194-195).

This denial of further instructions to the salvor, this refusal to invest further in salvage of another's property, was the very antithesis of the dominion of ownership. It was entirely consistent with appellant's refusal to accept surrender of appellee's interest in the property and insistence that she proceed with salvage; and it signified that the salvor must look to either the appellee or the vessel herself for reimbursement of additional salvage charges. It was no concern of the underwriter should the appellee choose not to recover her vessel; but on the other hand the salvor's lien, together with practical considerations which the court below ingenuously ignored, assured appellant that the vessel would be taken to port and not given to the sea. As Captain Hagood put it:

---

[47] *See* assignment No. 6 *supra*.

> I couldn't very well abandon her in the middle of the ocean because I would have gotten into trouble with the U.S. Coast Guard for leaving a menace to the sea. So I had to take her someplace and I dragged her to Kaunakakai. (R. 69).

And as both parties then knew that the vessel had been removed successfully from the strand and was well on her way to a safe port, this refusal to instruct the salvor cannot by even the most tortuous logic be construed to indicate that appellant had given up saving her. Appellant at considerable expense had already proved its point: that it was feasible to get the vessel safely to port.

C. EXPENSE OF RECOVERING AND REPAIRING THE VESSEL WOULD NOT EXCEED $21,000.

Winnowing from the decision below those patently improper and unsupported findings leaves nothing upon which to rest the conclusion of justified abandonment by appellee and liability of appellant for constructive total loss of the insured vessel. Appellant therefore assigns the following as error:

> 15. That the District Court erred in failing to conclude that the vessel, in either her stranded position or her righted position at Kaunakakai wharf on June 14th, could in all human probability have been recovered and repaired at a cost not exceeding $21,000.
>
> 16. That the District Court erred in failing to conclude that at the time of abandonment the vessel was not a constructive total loss within the terms of the policy and that libelant-appellee had no right to abandon her and claim for a constructive total loss.
>
> 17. That the District Court erred in entering its final decree herein.

Review of the record leaves no doubt that appellee misapprehended her burden of proof in this case. She made no attempt to show what the cost of recovering MISS PHILIPPINE from the strand and of repairing her would be, apparently content to rest her case upon inexpert generalities directed to the propositions that the vessel either could not be saved or was not worth saving. No volume of credible testimony on these points could warrant a recovery for constructive total loss in the absence of competent proof that expense of recovery and repair would exceed the stipulated sum of $21,000, yet the record is barren of such proof.

A brief summary of the evidence adduced by appellee will demonstrate this fatal default of proof.

Henry Morton, master of the stranded sampan, testified that when the Coast Guard boat arrived at the scene on June 6th, he told them that there was nothing they could do (R. 73).[48]

He said he noticed water coming through the engine room, the bottom broken, the ice-box broken, and the whole bottom gone (R. 73), although admitting that he didn't inspect the hull from outside during his three days at Kaupo (R. 77). Concerning efforts to save the vessel, he stated that they—

> . . . couldn't do nothing because we didn't have no equipment there. (R. 73-74).

Thus he implied that salvage might have been effected with proper equipment.

---

[48]Note the erroneous finding of the trial court attributing this extra-judicial opinion to the Coast Guard (R. 15).

Mr. Cadiente also reflected this defeatism. On June 7th he observed a big hole in the vessel's hull and water flooding through her engine room under the deck (R. 92). The next day he again inspected the vessel and, according to his testimony, found all the keel almost gone and some of the ribs gone (R. 92); and he described her condition as badly damaged (R. 107), plenty damaged (R. 118), getting worse and worse (R. 167). Although neither a fisherman nor a seaman himself (R. 113, 114), he decided that his crew could not salvage the vessel themselves because there was no equipment available (R. 92, 93).

On meager evidence of this nature did appellee seek to justify her abandonment. Significantly the boat-builder, whose unexpressed opinion the court below found so meritorious, was not even called to testify; and neither was Mr. Yamamoto, who undertook to rebuild the vessel for his own use, nor any other witness qualified to advise the court regarding prospective costs of recovery and repair. Even more significantly, appellee's only witness on the subject of salvage refuted the claim of constructive total loss.

Captain Hagood of the MAIZIE-C inspected the vessel from the air on June 7th and concluded that he could rescue her from the strand (R. 63), and upon the authorization of Mr. Cadiente he returned to Honolulu to undertake her salvage (R. 64). On June 11th he found the vessel in the same position on the rocks with her keel still intact though chafed, four or five ribs knocked out, her fore peak holed and some bottom-planking gone, but with her engine and engine-bed still intact; and he satisfied himself that she would not come apart when pulled

and would remain towable when taken off the beach (R. 51, 65-66). In brief, Hagood's inspection on this date merely confirmed his earlier conclusion that he could get her off and tow her successfully (R. 65). His effective salvage operation conducted on June 12-14, 1949, gave ample verification of his skillful analysis of the situation.

It was upon this state of evidence that appellee rested her case. Since appellee had failed to prove, by so much as a scintilla of evidence relating to expense of recovering and repairing the vessel, that she had sustained a constructive total loss within the terms of her policy of insurance, appellant was entitled at that point to dismissal of the libel. One cannot propound a case more squarely within the ruling of *Soelberg v. Western Assur. Co.*,[49] involving a policy which denied the right to abandon unless damage exceeded a certain amount, wherein this Court approved a peremptory instruction to the jury that the assured had failed to prove a constructive total loss within the terms of the policy in question, stating:[50]

> . . . no evidence appears in the record to give any basis whatever for the determination of the percentage of damage. The only evidence in this regard is confined solely to the proposition, heretofore stated, that the vessel when repaired would not be worth the cost of repairs, which is, as we have heretofore attempted to show, wholly insufficient. There must be some testimony upon which a jury could act in fixing the amount of damages. There being none, the court did not err in directing the jury to find a verdict for defendants.

---

[49] *See* note 8 *supra*, 119 Fed. 23.
[50] *Id.* at 33.

Appellant's motion to dismiss was denied (R. 121-122). This erroneous ruling of the court below is not challenged on appeal because appellant thereafter went forward with evidence and proved affirmatively that appellee had no ground for recovery on the policy.

Mr. Frank Gallagher, a practicing marine surveyor of considerable professional experience (R. 123-124, 133), testified for appellant that he conducted a survey of the stranded vessel on June 7, 1949. At that time he ascertained damage which included a large hole in the starboard planking of the engine compartment, remaining planking of engine and fish compartments intact but sustaining damage through constant rocking of the vessel by waves, keel and stem scuffed by rocking action but intact as structural members, rudder carried away, and propeller and shaft badly damaged (R. 126-128). There was then no injury to the vessel above her chines (R. 128). In his professional opinion, she was then completely salvageable (R. 126), had sufficient value to warrant her repair for further use (R. 136), and should have been salvaged immediately (R. 129).

Again on Saturday, June 11th, Mr. Gallagher attended the stranded sampan. He testified to finding her damage increased about twenty per cent from the friction of rolling on the rocks, caused by normal surge of the sea, but concluded that she was still salvageable (R. 130-131).

In these observations and opinions Mr. Gallagher corroborated substantially the views expressed by appellee's own witness, Captain Hagood. There was no material disagreement in their expert testimony either as to the

vessel's condition on the strand or the feasibility of getting her off.

Mr. Gallagher made a final survey of MISS PHILIPPINE at Kaunakakai on June 14th when, at his recommendation, the vessel was rotated from her capsized position and tied, keel-down and buoyant, at the wharf (R. 132, 150, 153). Considering the vessel's condition at that time, he expressed the estimate that her repairs could be effected for about $7,000 in Honolulu and that cost of towing her to Honolulu would be about $700 (R. 135, 136). He also stated his opinion that the vessel could be towed to Honolulu in her existing condition or temporarily repaired at Kaunakakai by means of salvage patches, and that it was also feasible to transport her by barge (R. 146, 152).

We cannot over-emphasize that the foregoing testimony stands alone and unimpeached on the vital question of expense of recovering and repairing the vessel and, when superimposed upon appellant's actual expenditures in salvaging the sampan (R. 159), shows that such expense would not rise to even one-half of the amount necessary for a constructive total loss under this policy.

The court below deemed this estimate of costs not convincing, believing that such testimony "could be so highly colored by guesswork alone" (R. 22), yet it had before it no other evidence from which to draw a conclusion as to the expense of recovering and repairing MISS PHILIPPINE. The master's opinion concerning the necessity of abandonment is not controlling but must be justified by existing circumstances,[51] which are expenses of recovery

[51] *Patapsco Ins. Co. v. Southgate, supra* note 4, 5 Peters at 621.

and repair exceeding $21,000 under this policy. What must guide a court in its determination of such matters if not the considered opinion of men experienced in that field? One District Court sitting in New York has given a far more rational evaluation of such testimony, as follows:[52]

> It is difficult to analyze or dispute the testimony of such witnesses about matters of their judgment: their businesses operate in utter dependence upon them; their conclusions are largely relative and only the actual operation can prove how far they were wrong, if at all; their facilities and the expertness of their workmen and even of the workers in different departments of each bidder are different, *but this is no reason why their testimony should be discarded or even doubted by a judge.* We are persuaded that in the absence of any satisfactory effort by respondent to prove any of the bids or any part of them unreasonable or unacceptable, proof of any one would have been satisfactory performance of libellant's duty to bear the burden of proof which we recognize. (Emphasis added.)

This situation, of course, is the converse of the *Jeffcott* case, this assured having made no showing of actual or probable expense and appellant having tendered the only evidence on that subject. It bears strong resemblance to the case of *Searles v. Western Assur. Co.*,[53] arising under a policy which defined constructive total loss as damage necessitating repairs at a cost of 75 per cent of the barge's agreed value. That owner rested his

---

[52]*Jeffcott v. Aetna Ins. Co.*, 40 F. Supp. 404, 408 (S.D.N.Y. 1941).

[53]See note 13 *supra*, 88 Miss. 260, 40 So. 866.

case upon proof that the barge sank as a result of an insured peril, that he deemed it of no value and gave notice of abandonment, and that he spoke with many men about raising it but all knew of its condition and would not undertake the job; whereas the underwriter produced several marine experts to show the feasibility of recovery and repair. Approving a peremptory instruction for the underwriter, the reviewing court held:[54]

> It was incumbent on appellant to make this proof in the court below and we think he utterly failed to do so. . . . Appellant not only fails to make out a case, but the defendants show beyond dispute, putting the testimony most strongly for appellant, that to repair the damage caused solely by the disaster . . . would cost less than 25 per cent of $3,000, the agreed value of the vessel.

With but slight revision in figures, the above language could not describe this case more aptly.

In a decision of similar tenor, where the underwriters showed that in the opinion of experts—men of large experience and competent knowledge on the subject—a sunken boat might have been raised and repaired in short time, their highest estimated cost of raising and repairing being $2,000, it was held that the assured had failed to prove a right to abandon and recover as for total loss under a policy valuing the boat at $9,000.[55]

It would have been difficult for the appellee to abandon under circumstances less calculated to justify that act.

---

[54] *Ibid.*, 40 So. at 869.

[55] *Hundhausen v. U.S. Fire & Marine Ins. Co.*, 3 Tenn. Cas. 184, 17 S. W. 152 (1875).

Mr. Cadiente consulted only one nautical expert at the scene of stranding and presumably had the benefit of Captain Hagood's opinion, that the vessel could be saved, before authorizing him to proceed with salvage; yet, relying upon his own inexperienced judgment and without profesional advice, he gave up any attempt to save the vessel and returned to Honolulu. This seems not the action of a prudent, uninsured owner in caring for his property but, rather, callous reliance upon the indemnity of insurance.

Moreover, it is a matter of record that when the appellee tendered her abandonment on June 13th, the sampan had already been rescued and was then under tow to a safe port—and the appellee was so informed.[56] Condition of the vessel both before and after salvage has already been rehearsed, but only brief testimony of Captain Hagood relates directly to circumstances existing at this time. He stated that weather and water were very smooth, and that his inspection of the capsized sampan during the course of towing convinced him that she was in good enough shape to take to Kaunakakai (R. 53). Thus her ill-advised abandonment at that time left appellee in much the same position as that of the assured in *Fireman's Fund Ins. Co. v. Globe Nav. Co.*,[57] wherein the insured vessel had been left in distress at sea on October 13th and towed into port by a salvor on October 15th and notice of her abandonment given to the underwriter on October 16th.

---

[56]*See* part I. B *supra*.

[57]*See* note 27 *supra*, 236 Fed. 618; *cf. Smith v. Universal Ins. Co.*, 6 Wheat. 176 (U.S. 1821); *King v. Delaware Ins. Co.*, 6 Cranch 71 (U.S. 1810); *Wood v. Lincoln & Kennebeck Ins. Co., supra* note 16, 6 Mass. 479, 4 Am. Dec. 163.

This Court held that, irrespective of whether actuality or high probability of loss should control the right to abandon under that policy, no such right existed because:[58]

> The right of the appellee to abandon the vessel, if such right existed, must therefore be determined by the situation of the vessel and the conditions existing on Monday, October 16th, when the written notice of abandonment was given to the agent of appellant. At that time the vessel was afloat and riding safely at anchor in the harbor of Astoria, and its situation and condition had no other high probability than that disclosed by the evidence, which we have already considered and found insufficient to establish a constructive total loss.

So, also, the evidence relating to the condition and situation of MISS PHILIPPINE at the time of her abandonment on June 13, 1949, disclosed no probability other than the actual and estimated expenses shown by appellant.

It is beyond dispute that where an assured offers no evidence as to the amount of damages sustained,[59] or does not show an amount of damage sufficient to justify abandonment under the terms of his insurance policy,[60] he

---

[58] *Id.* at 636.

[59] *Standard Marine Ins. Co. v. Nome Beach L. & T. Co., supra* note 3, 133 Fed. 636; *Soelberg v. Western Assur., supra* note 8, 119 Fed. 23; *McKern v. Corporation of Royal Exch. Assur.*, 85 Ore. 652, 167 Pac. 795 (1917).

[60] *Marcardier v. The Chesapeake Insurance Co., supra* note 1, 8 Cranch 39; *Klein v. Globe & Rutgers Fire Ins. Co., supra* note 11. 2 F. (2d) 137; *Fireman's Fund Ins. Co. v. Globe Nav. Co., supra* note 27, 236 Fed. 618; *Chicago S.S. Lines v. United States Lloyds, supra* note 12, 2 F. (2d) 767, *aff'd* 12 F. (2d) 733; *Levi v. New Orleans Mut. Ins. Ass'n, supra* note 15, 15 Fed. Cas. 418, No. 8,290; *Orrok v. Commonwealth Ins. Co.*, 38 Mass. 456, 32 Am. Dec. 271 (1839); *Deblois v. Ocean Ins. Co.*, 16 Pick. 303, 28 Am. Dec. 245 (Mass. 1835).

fails to carry his burden of proving a constructive total loss.

We submit that the appelee could not have failed more completely to prove her case for constructive total loss; and more, that the evidence produced by appellant proved conclusively that at the time of her abandonment the insured vessel could have been recovered and repaired at an expense not exceeding $21,000 or even a moiety of that sum. Recovery for constructive total loss of MISS PHILIPPINE should therefore have been denied.

II. FAILURE OF APPELLEE TO ACT FOR THE DEFENSE, SAFEGUARD AND RECOVERY OF THE INSURED VESSEL BARS HER RECOVERY.

This argument deals with the following assignments of error:

> 22. That the District Court erred in failing to conclude that the policy sued upon required libelant-appellee to labor for the defense, safeguard and recovery of the vessel.
>
> 23. That the District Court erred in failing to find that libelant-appellee failed to make any reasonable, proper and practicable effort to save and conserve the vessel and in failing to conclude that such failure operated to bar her recovery for constructive total loss.

This policy contains the standard provision making it necessary for the assured to sue, labor and travel for, in and about the defense, safeguard and recovery of the property insured (R. 7). The purpose of this portion of

the sue-and-labor clause is to encourage and bind the assured to take steps to prevent a threatened loss for which the underwriter would be liable if it occurred, and when a loss does occur to take steps to diminish the amount of the loss.[61] It also undertakes to indemnify the assured proportionately for expenses incurred in all such efforts to save and preserve the vessel from loss (R. 7).[62]

It is well stated that in an agreement of this kind, calling for security against loss by any peril insured against, the underwriter contracts to give that security upon the condition that all practicable means be employed on the part of the assured to make such loss as light as possible; and that such contract by its very nature requires a faithful observance of all obligations imposed by it upon either party.[63] Thus where the captain of a sunken river boat constructed an imperfect bulkhead which would not exclude water when it had been pumped out, and without further effort to raise the boat proceeded to wreck her, and the underwriters thereafter demonstrated the feasibility of salvage by raising her in three days, it was held that for want of due care, diligence and skill in efforts to save the vessel, the owner was not entitled to abandon her as a constructive total loss.[64]

Another federal court ruled that after the stranding of an insured vessel, the master and crew were bound to use their best exertions to get her off and save her; and that

---

[61] *White Star S.S. Co. v. North British & Merc. Ins. Co.*, 48 F. Supp. 808, 813 (E.D. Mich. 1943).

[62] *Ibid.*

[63] *Copeland v. Phoenix Ins. Co.*, *supra* note 16, 6 Fed. Cas. No. 3,210, at 508.

[64] *Ibid.*

if they neglected to use all reasonable means and exertions to save her from consequent wreck and destruction, the loss was not within the policy and the assured could not recover as for total loss.[65]

The obligation of an insured owner has been thus defined:[66]

> The rule in such cases is that where the loss is not total or absolute, but only a disabling or stranding of the vessel, it is the duty of the assured to act with the same energy and use such means to save the vessel as a prudent man would do, under the circumstances, if not insured; that is, he is honestly to use all such means as are at his command, under the circumstances, to save the property, and, if he fails to do this, he cannot abandon and throw the entire loss on the (*sic*) assured.

The sue-and-labor clause merely spells out this duty of the assured to employ all reasonable means at his disposal toward saving the vessel, upon pain of losing the benefit of indemnity.[67]

And this Court has indicated the merit of a peremptory direction for the underwriter in the absence of evidence tending to show any reasonable effort on the part of the assured to minimize loss and thereby prevent a total loss.[68]

---

[65] *Howland v. Marine Ins. Co. of Alexandria,* 12 Fed. Cas. 741, No. 6,798 (C.C.D.C. 1824).

[66] *Hundhausen v. U.S. Fire & Marine Ins. Co., supra* note 55, 17 S.W. at 154 (abandonment for constructive total loss not justified).

[67] *Chicago S.S. Lines v. United States Lloyds, supra* note 12, 12 F. (2d) 733.

[68] *See Standard Marine Ins. Co. v. Nome Beach L. & T. Co., supra* note 3, 133 Fed. 636.

Whether this appellee made all reasonable efforts to save MISS PHILIPPINE is not now open to debate, because the record shows that she made absolutely no effort. Her master said he could do nothing because of lack of equipment (R. 73-74), yet he sent away the government's rescue-boat without any attempt to remove the stranded vessel from her perilous position (R. 73); but it should be remarked that appellant's representative, with somewhat more ingenuity, got her off by means of a tractor borrowed from a nearby ranch (R. 130, 148). Appellee's husband and manager, after cursory inspection of the vessel on two successive days, also gave up in despair and returned home without lifting a hand in the protection or recovery of the sampan, meanwhile withdrawing his authorization from the agency which had offered to effect salvage (R. 92-93). In short, appellee did nothing. She chose to leave the vessel pounding on the rocks where, regardless of her perfect structural condition at the time of stranding, the vessel would inevitably become an actual total loss in time. She declined to respond to appellant's demand that salvage be undertaken (R. 111). And a full week after the stranding, when damage to the vessel had increased measurably (R. 130-131), she tendered her abandonment to appellant.[69]

We submit that such conduct on the part of appellee bars her recovery on this policy for a constructive total loss. Reasonable means of saving the vessel were available to her,[70] yet she rejected them all, content to await the vessel's ultimate destruction. It is settled law that notice of abandonment, to be effective, must be given

---

[69]*See* part I. B *supra*.

[70]That appellant's salvage operation was immediately successful is probative evidence of what would be reasonable effort in the circumstances. *Royal Exch. Assur. v. Graham & Morton Transp. Co.*, *supra* note 4, 166 Fed. 32; *The Henry*, 11 Fed. Cas. 1153, No. 6,372 (S.D.N.Y. 1834).

promptly after the assured learns of the loss;[71] that unjustified delay in giving such notice amounts to waiver of the right to abandon and forecloses the possibility of a constructive total loss;[72] and that if the assured postpones abandonment until the vessel has become a technical wreck, such delay is fatal to the right to abandon.[73] To concede to an insured owner the right to lie by and speculate upon future events would, as one federal judge has so aptly put it,[74]

> . . . make the policy an instrument of larceny and not of indemnity.

III. ACTS OF APPELLANT IN RECOVERING, SAVING AND PRESERVING THE INSURED VESSEL DID NOT CONSTITUTE ACCEPTANCE OF HER ABANDONMENT.

The court below held that appellant had by its conduct made itself liable for a constructive total loss, to which ruling appellant assigns the following error:

> 24. That the District Court erred in concluding that on June 14, 1949, respondent-appellant had no right to protect the vessel.
>
> 25. That the District Court erred in failing to conclude that the policy provided that no act of respondent-appellant in recovering, saving or preserving the vessel should be considered as an acceptance of abandonment and that the acts of respondent-appellant in

---

[71] *Duncan v. Koch*, 8 Fed. Cas. 13, No. 4,136 (C.C. P.A. 1801).

[72] *Independent Transp. Co. v. Canton Ins. Office*, 173 Fed. 564 (W.D. Wash. 1909); *Hurton v. Phoenix Ins. Co.*, 12 Fed. Cas. 1047, No. 6,941 (C.C. Pa. 1806).

[73] *Klein v. Globe & Rutgers Fire Ins. Co., supra* note 11, 2 F. (2d) 137; *see Peele v. Merchants' Ins. Co., supra* note 2, 19 Fed. Cas. No. 10,905, at 112.

[74] Judge Clancy in *Jeffcott v. Aetna Ins. Co., supra* note 52, 40 F. Supp. at 411.

procuring the salvage and recovery of the vessel did not constitute a constructive acceptance of abandonment.

26. That the District Court erred in concluding that libellant-appellee was entitled to recover upon the policy for constructive total loss of the vessel.

Appellant does not dispute the facts upon which this ruling (R. 22-23) must necessarily rest, viz.: its agreement to pay not more than $1,500 in salvage charges to King Limited (R. 80-83), executed on June 11th after the appellee had failed to undertake salvage (R. 64, 176); the succesful removal of the vessel from the rocky beach by its agent and the salvor on June 12th (R. 52, 130); its rejection of appellee's tendered abandonment on June 13th, while the vessel was under tow on the high seas, and its refusal thereafter to give the salvor further instructions committing more money to salvage (R. 188-195); its righting of the vessel on June 14th and leaving her tied in a buoyant position at Kaunakakai wharf (R. 150, 153, 160); and its explicit refusal to accept the abandonment of which formal notice was given by appellee's letter dated June 14th (R. 103-105). Appellant's position is simply that, as a matter of law, these facts cannot here be deemed to constitute an acceptance of abandonment.

In the first place, this policy provides in unmistakable terms that no recovery for a constructive total loss may be had thereunder unless expense of recovering and repairing the vessel shall exceed $21,000, a condition precedent which the appellee has not even tried to prove.[75]

[75] *See* part I *supra*.

These terms exclude any application of the technical doctrine of implied acceptance and require that the assured, to recover, must prove her loss to lie within the policy's terms.

Moreover, it is clear that the pleadings raised no issue of acceptance of abandonment. Appellee's libel did not even allege an abandonment, much less an acceptance thereof by appellant (R. 2-4). Recovery must be had, if at all, on the facts alleged in the libel; and the decree must conform to and be supported by the pleadings.[76] Hence the court below erred in deciding this case upon a distinct theory not pleaded,[77] quite apart from its erroneous construction of the evidence and disregard of the policy itself, and so much of the decree rendered on that ground is invalid.[78]

Even if constructive acceptance of abandonment could be deemed a proper issue in this case, such a result is effectively precluded by the following provisions of the policy's sue-and-labor clauses:

> . . . nor shall the acts of the Assured or Insurers, in recovering, saving, and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment (R. 7);

---

[76] *Webster Eisenlohr v. Kalodner*, 145 F. (2d) 316 (C.C.A. 3d 1944); *Sylvan Beach v. Koch*, 140 F. (2d) 852 (C.C.A. 8th 1944); *cf. Standard Oil Co. v. Missouri*, 224 U.S. 270 (1912); *Barnes v. Chicago, M. & S. P. Ry.*, 122 U.S. 1 (1887); *Drybrough v. Ware*, 111 F. (2d) 548 (C.C.A. 6th 1940); *Deitrick v. Standard Surety & Casualty Co.*, 90 F. (2d) 862 (C.C.A. 1st 1937), *aff'd* 303 U.S. 471 (1938); *Mutual Life Ins. Co. v. Dingley*, 100 Fed. 408 (C.C.A. 9th 1900), *rev'd on other grounds* 184 U.S. 695 (1902).

[77] *Goodrich Transit Co. v. Chicago*, 4 F. (2d) 636 (C.C.A. 7th 1925).

[78] *Reynolds v. Stockton*, 140 U.S. 254 (1890).

> And it is expressly declared and agreed that no act of the Assurers or Assured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment. (R. 8.)

Clauses of this nature have been generally adopted in marine policies in consequence of Mr. Justice Story's comprehensive dictum[79] that insurers' acts of taking exclusive possession of an insured vessel to repair her for the account of her owners, without the owners' consent, constituted in law an acceptance of her tendered abandonment.[80]

Under such clauses the acts of underwriters in saving insured vessels have been held to imply acceptance of abandonment *only* when coupled with other acts unauthorized by the policies in question, notably, unjustified withholding of possession of the vessel from the assured,[81] and failure of the underwriter to make complete reparations and return the vessel within a reasonable time after having undertaken repairs pursuant to a right expressly granted by the policy.[82] *Copelin v. Insurance Co.*,[83] is probably the leading case of this type. It involved a policy which, in addition to the sue-and-labor clause, al-

---

[79] *See Peele v. Merchants' Ins. Co., supra* note 2, 19 Fed. Cas. No. 10,905, at 118-119.

[80] *See Northwestern Transp. Co. v. Continental Ins. Co.*, 24 Fed. 171, 177 (C.C.E.D. Mich. 1885).

[81] *Kahmann & McMurry v. Aetna Ins. Co.*, 242 Fed. 20 (C.C.A. 5th 1917).

[82] *E.g., Hume v. Frenz*, 150 Fed. 502 (C.C.A. 9th 1907); *Northwestern Transp. Co. v. Continental Ins. Co., supra* note 80; *Young v. Union Ins. Co.*, 24 Fed. 279 (N.D. Ill. 1885); *cf. Reynolds v. Ocean Ins. Co., supra* note 16, 22 Pick. 191, 33 Am. Dec. 727.

[83] 9 Wallace 461 (U.S. 1869).

lowed the underwriter to interpose and cause the vessel to be repaired if the assured failed to do so; and there the underwriter had tendered the salvaged vessel, with repairs admittedly insufficient, more than six months after her sinking. Mr. Justice Strong reasoned that the policy authorized the underwriter to take possession only for the purpose of complete repair; that taking possession for only partial repair or retaining possession for an unreasonable time were unauthorized by the policy and hence not protected by the sue-and-labor clause; and that such unauthorized acts therefore constituted substantial recognition of the owner's abandonment.

It must be observed that this policy contains no such provision authorizing appellant to repair MISS PHILIPPINE,[84] and that appellant neither undertook to repair her nor withheld possession thereof from the appellee at any time. The rationale of those decisions which turn on the underwriter's failure to make adequate and timely repairs thus has no application here. Even those cases recognize that the object of the sue-and-labor clause is to prevent the mere act of taking possession and rescuing the property from being treated as, *ipso facto,* an acceptance of abandonment.[85]

Abundant authority supports appellant's contention that mere salvation of the distressed vessel cannot be taken as an acceptance of abandonment. Thus, where abandonment had been tendered and refused, and thereafter the under-

---

[84]Such a clause has significance solely in cases of partial loss and would be surplusage in a policy covering total loss only.

[85]*See Northwestern Transp. Co. v. Continental Ins. Co., supra* note 80, 24 Fed. at 178.

writer's agent cooperated actively with the master in getting the damaged vessel into port for repairs, this Court held that the agent had not performed any act beyond the powers conferred by the sue-and-labor clause which might evidence acceptance of abandonment.[86] A like conclusion was reached where a sunken vessel was raised by a wrecking company, then libeled for salvage and sold.[87] And where the underwriter dispatched aid to rescue a stranded steamer and actually towed her to a safe port, but did not order her repaired, the Supreme Court ruled that such conduct by the underwriter did not establish a constructive acceptance of abandonment in the face of the policy's sue-and-labor clause.[88]

Perhaps the most definite statement of the clauses's effect was given by the Supreme Court in *Washburn & Moen Mfg. Co. v. Reliance Ins. Co.*:[89]

> The sue and labor clause expressly provided that acts of the insurer in recovering, saving and preserving the property insured, in case of disaster, were not to be considered an acceptance of abandonment. Whether regarded as embodying a common-law principle, or as new in itself, the clause must receive a liberal application, for the public interest requires both the insured and insurer to labor for the preservation of the property. And to that end provision is made that this may be done without prejudice.

Accordingly the Court held that acts of a cargo underwriter, in paying for salvage of the cargo and trans-

---

[86] *Soelberg v. Western Assur. Co., supra* note 8, 119 Fed. 23.
[87] *Levi v. New Orleans Mut. Ins. Assn., supra* note 15, 15 Fed. Cas. 418, No. 8,290.
[88] *Richlieu Nav. Co. v. Boston Ins. Co.*, 136 U.S. 408 (1890).
[89] *See* note 4 *supra*, 179 U.S. at 18.

shipping it to destination despite the owner's offer of abandonment, could not operate as a constructive acceptance. The underwriter had refused to accept abandonment, there was no ambiguity in its attitude, and what it did was no more than it had the right to do without incurring a liability expressly disavowed.

In another case, an insured steamer sank at her dock, and her owner thereupon notified the underwriters of abandonment. The latter promptly arranged for salvage, however, and had the vessel raised within a week after her sinking. Noting that the policies in question conferred upon the underwriters no right to make repairs and that they never took possession for that purpose, the court held that they could not be punished for trying to minimize the damage, saying with respect to the sue-and-labor clause:[90]

> This provision is in the public interest. It leaves both insurer and insured free to act for the safety of the vessel without prejudice to their respective rights under the policy. . . . The acts which are protected are those reasonably tending toward the recovery of or the safety of the vessel. In my opinion the mere raising of the Clyde did not constitute an acceptance of abandonment.

In affirming the foregoing decision, the Circuit Court of Appeals observed that *Copelin v. Insurance Co.*,[91] involving both inadequate repairs and unreasonable retention of

---

[90] *Chicago S.S. Lines v. United States Lloyds, supra* note 12, 2 F. (2d) at 769.

[91] *See* note 83 *supra*, 9 Wallace 461.

possession by the underwriter, was a very different case and stated:[92]

> In dealing with wrecks or lesser casualties to vessels, it is of the utmost importance, not only to the insured, but to the insurer, that immediate steps be taken, not only for the protection of the vessel and cargo, but also for the ascertainment of the exact condition and damage to each. By the former, the property is conserved, and by the latter the facts are ascertained and preserved for the determination of the rights of the parties. It is the duty and the right of the insured to save and conserve the property, and it is the right, if, indeed, not the duty, of the insurer to do the same.

Even more recently it has been held that an underwriter's acts of salvaging a submerged yacht and replacing her, unrepaired, at her berth, after having refused to accept abandonment, were protected by the sue-and-labor clause and did not give the owner ground for recovery on the theory of implied acceptance of abandonment.[93]

So, in this case, appellant ran no risk that its acts of contracting for salvage of the vessel, getting her off the strand and into a safe harbor, and righting her, would be deemed an acceptance of abandonment. The court's inference (R. 22) that appellant had no consent of the salvor to protect the vessel at Kaunakakai is just as incomprehensible as its conclusion (R. 22, 23) that appellant accepted the abandonment by releasing (not abandoning)

---

[92]12 F. (2d) at 737.

[93]*Jeffcott v. Aetna Ins. Co.*, 32 F. Supp. 409 (S.D.N.Y. 1940) (sustaining exceptions to libel).

the vessel to appellee after she gave notice of abandonment. Appellant was merely exercising a right conferred upon it by express terms of the policy, a right which inured to the benefit of everyone concerned with the property. And its acts of saving the vessel were, in point of time, completed before the appellee even tendered abandonment. Nowhere is it suggested that acts of the underwriter prior to abandonment could possibly constitute an acceptance of abandonment.[94] Statement of such a proposition carries its own refutation.

To summarize: the doctrine of constructive acceptance of abandonment has no application under a policy which permits recovery only upon proof of specified damage; it was not invoked by the pleading in this case; it cannot apply to acts of the underwriter which are expressly sanctioned by the policy's sue-and-labor clauses; and it cannot in any event operate until an abandonment has been tendered by the assured. All of these defenses exist here, and each prevents any recovery against appellant on the theory of constructive acceptance of appellee's abandonment of MISS PHILIPPINE.

---

[94] *Contra: Richlieu Nav. Co. v. Boston Ins. Co., supra* note 88.

CONCLUSION.

For the foregoing reasons, we ask that the decree appealed from be reversed and this cause remanded to the District Court for the District of Hawaii with directions to enter decree for the appellant.

Dated, Honolulu, Hawaii,
September 1, 1950.

Respectfully submitted,
THOMAS M. WADDOUPS,
ROBERT E. BROWN,
Proctors for Appellant.

ROBERTSON, CASTLE & ANTHONY,
Of Counsel.

No. 12,574

IN THE

United States Court of Appeals

For the Ninth Circuit

THE INDEMNITY MARINE ASSURANCE COMPANY, LIMITED,
Appellant,

vs.

FULGENCIA D. CADIENTE,
Appellee.

Appeal from the United States District Court for the District of Hawaii.

BRIEF FOR APPELLEE.

HYMAN M. GREENSTEIN,
501 Honolulu Merchandise Mart Building, Honolulu, Hawaii,
Proctor for Appellee.

Subject Index

Table of Authorities Cited

Cases

Texts

No. 12,574

IN THE

United States Court of Appeals

For the Ninth Circuit

THE INDEMNITY MARINE ASSURANCE COMPANY, LIMITED,
Appellant,

vs.

FULGENCIA D. CADIENTE,
Appellee.

Appeal from the United States District Court for the District of Hawaii.

BRIEF FOR APPELLEE.

INTRODUCTORY STATEMENT.

This is a suit in admiralty by appellee to recover on a policy of marine insurance for an alleged constructive total loss of the insured vessel Miss Philippine, by reason of the stranding of the vessel at Kaupo, Island of Maui, Territory of Hawaii, on June 6, 1949.

Upon trial duly had before the court below, the district court found for appellee in the face amount of the policy.

Appellee concurs in the jurisdictional statement of appellant.[1]

STATEMENT OF THE CASE.

As the findings of fact made by the district judge present what appellee claims to be the facts proved in the instant case, they are adopted and incorporated herein by reference as appellee's statement of the case, or statement of facts.[2]

The district judge, to put the case concisely, found:

1. That appellee was the owner of the vessel Miss Philippine insured by appellant for total or constructive total loss in the face amount of $10,500.00.

2. That on Monday, June 6, 1949, the vessel was stranded by reason of the displacement and loss of her propeller and rudder and driven onto a boulder-strewn beach at Kaupo, Island of Maui, Territory of Hawaii, and was being pounded and heavily rocked by a fairly high sea.

3. That appellee, and apparently also appellant, was notified thereof by the U.S. Coast Guard the same day.

4. That a Coast Guard craft went to the scene and reported that it was unable to draw the vessel off the rocky beach.

---

[1]Appellant's Brief, pp. 1, 2.
[2]See Appendix B, below.

5. That appellee's husband and agent visited the scene the next day to examine the vessel but was unable to board her.

6. That appellee's agent took with him one Charles P. Hagood, master of King Limited's tug-boat, "Maizie C" who viewed the scene from the air, told Cadiente he could get the vessel into sea and tow her to Honolulu; and that a tentative oral agreement was made that he proceed.

7. That the following day Cadiente, the vessel's master and crew went aboard the Miss Philippine, made a more thorough examination, and that Cadiente came to the conclusion that it would be a hopeless and unjustifiable risk to undertake the salvage of the vessel, and that Cadiente decided then and there to abandon the vessel as a total loss.

8. That on the same day he phoned Mr. Hagood not to proceed with salvage operations and that he was abandoning the vessel.

9. That he returned to Honolulu, and on June 9 after getting advice from the party who built the vessel, he was confirmed in his judgment and decision of abandoning the vessel.

10. That in the evening of June 9 he received a letter from appellant demanding that he proceed to salvage the vessel.

11. That the following morning, he called at the office of the appellant, and advised appellant of his abandonment of the vessel.

12. That at the request of appellant he then went to the office of appellant's attorneys, and again notified appellant and its attorney of his abandonment. That Mr. Waddoups told him to get a lawyer and come back.

13. That he returned on Monday, June 13, and the following day appellee's attorney made written demand for loss under the policy.

14. That a charter party had been entered into between appellant and King, Limited, on June 11, to undertake the floating and towing of the vessel to Honolulu, with the specific provision that salvage operations were to be abandoned upon the aggregation of charges at the sum of $1,500; and that if the vessel were damaged or lost during salvage operations the charterer (appellant) would be responsible therefor.

15. That salvage operations commenced on June 11; that the vessel capsized upon reaching deep water, turning completely upside down; that this resulted in a serious towing problem, and would make difficult the probability of successfully crossing two rough channels on the way to Honolulu.

16. That when the $1,500 limitation was used up appellant was notified but gave no further instructions.

17. That Captain Hagood was apprehensive of towing to Honolulu and took the vessel to Kauna-

kakai, Molokai, though he could have taken her to other ports nearby on Maui.

18. That the vessel was tied up on June 14, at Kaunakakai, Molokai.

19. That agents of appellant flew from Honolulu to Molokai to have the boat lifted and righted.

20. That the vessel was given to one Yamamoto who took the vessel from the wharf to his yard.

QUESTIONS INVOLVED IN THE APPEAL.

1. Was appellee justified in abandoning the vessel on the beach at Kaupo, Maui?

   a. Was the vessel a constructive total loss?

   b. Did appellee have the duty to attempt rescue and salvage?

2. Did the acts of appellant insurance company

   a. Constitute acceptance of abandonment, or

   b. Waive abandonment or any defects in that abandonment?

SUMMARY OF ARGUMENT.

Appellee contends that regardless of the provision of the policy as to what constitutes a constructive total loss, it was not *under the facts of this particular case,* incumbent upon the assured to float, tow and repair the vessel to ascertain whether such expense would total $21,000:

1. Salvage attempts by the assured were hopeless, and all subsequent events confirmed appellee's decision to abandon and refuse to salvage;

2. The insurer (appellant) *by its conduct* made itself liable as for a constructive total loss, and waived all defects, if any, in the abandonment.

ARGUMENT.

I. APPELLANT'S CONTENTION THAT THE INSURED VESSEL WAS NOT A CONSTRUCTIVE TOTAL LOSS WHEN APPELLEE TENDERED HER ABANDONMENT.

A. APPELLANT'S CONTENTION THAT CONSTRUCTIVE TOTAL LOSS ARISES ONLY WHEN EXPENSE OF RECOVERING AND REPAIRING THE VESSEL EXCEEDS $21,000.

Appellee will be the first to admit that no attempt was made during the trial to prove the cost of recovering and repairing the insured vessel.

It is respectfully urged, however, that in view of the conduct of the insurance company, such is not a prerequisite to recovery hereunder.

And of the same opinion, was the district judge.[3]

If no other factors were present then the contention of appellant would have merit. Its fallacy lies in assuming that this is the only theory open to the appellee.

For cases of this type are decided, not on generalities of the law, but on the *facts of the case.*

---

[3]District Judge's opinion and conclusions, Ap. 21-23, Appendix B, below.

The vessel was stranded on the island of Maui; and repair meant first getting the vessel back to Honolulu, where there are facilities. Even appellant's charter party recognized this.[4]

Moreover, the evidence in the case conclusively confirmed appellee's judgment that it was not possible to get the vessel off *and* tow her to Honolulu.

> "A. From Kaupo to Lahaina, Maui, you are traveling mostly in the lee of the prevailing winds, and it is very smooth, under normal tradewind conditions. As soon as you come out from behind the northwest point of Maui, you encounter tradewinds sweeping down the channel between Maui and Molokai. It is still a trifle rough but not as rough as the channel between Molokai and Oahu. As you can see (referring to map), the channel between Molokai and Oahu (19) is much wider than the one between Molokai and Maui, and it is a much longer trip and there is little or no protection from the wind and the waves that prevail in normal tradewind weather.
>
> Q. So isn't it a fact, Mr. Hagood, that the reason you didn't continue to tow the vessel to Honolulu is because of that channel and the condition of the 'Miss Philippine'?
>
> A. That's right. In her capsized condition she made a very heavy drag, and I was only able to move it very slowly.
>
> Q. How fast were you going, by the way, average?
>
> A. Approximately one and eight-tenths knots per hour. That is very slow. And it would have taken me nearly two days to—well, I will revise

[4]Ap. 80-83; also set forth below, Appendix A.

> that—make it 30 hours. It would have taken me about 30 hours to tow the wreck at the speed that I was making from Kaunakakai on into Honolulu. And I was afraid at that time that the weather would increase in intensity and I stood a chance of losing the wreck in the channel between Molokai and Oahu." Ap. 61-62.

Appellant has written an excellent brief which gives an academically fine review of generalities of maritime and insurance law.

We have only one quarrel with appellant's position—it fails to fit the cases to the facts of *this* case.

For it was the insurer (appellant) who was responsible for the final outcome of the vessel, nay, who actually abandoned the vessel on the high seas.

After learning of the stranding of the insured vessel appellant arranged for a charter party to pull the vessel off the beach and tow her to Honolulu, with a money limit of $1,500. When the money limit had been reached the insured vessel was in tow at sea, but was abandoned by the insurance company.[5]

> "The Court. Well I heard what you said, but I am not quite sure what you mean by what you said. Now, you engaged the King company to take the vessel off the beach there, and you put a time limit or a money limit?
>
> The Witness. Yes, by the terms of the charter party they were to be paid at the rate of $15.00 an hour.

---

[5]See testimony of Mr. Chipchase, treasurer of Agent for Insurance Company, Ap. 156-159.

The Court. And that time expired when they had the vessel in tow out at sea?

The Witness. That's correct, sir.

The Court. Now, they didn't abandon the vessel at that time, but went ahead and go with responsibility and apparently on their own time took her into safe port and tied her up. Now, you say that when your contract with them ran out by its terms, that you abandoned the boat?

The Witness. They asked for instructions, your Honor, and we said there are none.

The Court. So it was up to them to do whatever they (118) wanted? They could cut her loose and be responsible only to the laws and regulations under which the Coast Guard operates?

The Witness. Right, yes, sir." Ap. 158-159.

And when the insurance company (appellant) took the vessel off the beach, towed her and then abandoned her at sea, it "bought" the vessel, and must be held liable as for a constructive total loss.

> "It would seem that an underwriter must not take possession of the property unless he intends to accept the abandonment; and meddling with it may be construed as acceptance, and bind him."
>
> Eldridge on Marine Policies, 2d Edition, p. 189.

Appellee did not feel it necessary to present evidence as the cost of repairs because the evidence established that it was impossible to tow the vessel to Honolulu where as a practical matter it could be repaired; but more important—that by reason of the acts of the appellant, in removing the vessel, towing

same and abandoning same at sea, appellant exercised acts of ownership and accepted or waived abandonment.

The court felt the same way.

For these reasons it is not felt necessary to dwell at length upon appellant's argument appertaining to the provision in the policy as to cost of recovery and repair. Appellant by its action took itself out of the protection of such provision.

B. APPELLANT'S CONTENTION THAT NUMEROUS FINDINGS OF FACTS WERE CLEARLY ERRONEOUS.

First it should be kept in mind that *all* the evidence adduced in the trial below was in open court, and that the findings and conclusions of a district court are entitled to great weight here.

The record speaks for itself—and it is submitted that all the material findings of fact are supported by adequate testimony and evidence.

> 1. That on June 8, 1949, parts of the vessel's keel were carried away.

Appellant has misquoted the findings of the district court; the court found:

> "her keel was badly battered and damaged with parts carried away."[6]

Mr. Hagood testified that the keel was chafed on the bottom (Ap. 66); and Mr. Gallagher, that the keel

---

[6]Ap. 16.

was torn. (Ap. 127.) And "it was scuffing due to being lodged in between rocks." (Ap. 127.)

Mr. Cadiente testified that the keel was "almost gone." (Ap. 92.) We submit that there is sufficient in the record to warrant the finding.

> 2. That libelant-appellee decided on June 8, 1949 to abandon the vessel.

Appellant objects that this finding is irrelevant and not supported by other evidence; to which we answer that there was sufficient evidence warranting the court in making this finding.

Such an objection merely shows to what length appellant is willing to proceed to extend its brief. The court did not find that there was a technical abandonment on that day.

Moreover, the finding as quoted by appellant is removed from its context.[7]

> 3. That Mr. Cadiente asked the Coast Guard on June 8, 1949, to notify respondent-appellant of abandonment.
>
> 4. That Mr. Cadiente told Captain Hagood on June 9, 1949, that he had abandoned the vessel.
>
> 5. That after discussion with the vessel's builder on June 9, 1949, he was confirmed in the judgment and decision to abandon her.

As to these findings it is submitted that there is evidence in the record to support the same.

---

[7]Ap. 16.

But even if not, it would not militate against appellee's main contention herein that appellant's liability is based upon appellant's conduct in assuming control, ownership and finally abandoning the vessel at high sea.

> 6. That libelant-appellee on June 10, 1949, told respondent-appellant and its attorney that she had abandoned the vessel.

Appellant confuses a stipulation by this proctor that a certain conference was held on June 13 to preclude appellee from having been present at an earlier conference with representatives of appellant.

Again we have a compounding by appellant of a finding by the court in an attempt to challenge the same. The important finding to keep in mind that was made by the court and does find corroboration in the evidence is that on June 10, Cadiente *did* tell Mr. Matthew at *his* office that he had abandoned the vessel (Ap. 171-172). The abandonment at the insurance office would be sufficient—whether or not it was later given again at the attorney's would not be of moment.

The important fact to keep in mind is that no matter how far forward appellant would move this notice of abandonment, the vessel was still under control of appellant annd clearly abandoned by appellant at sea after notice of appellee's abandonment.

> 7. That respondent-appellant's attorney on June 10, 1949, told Mr. Cadiente to come back and bring his wife on June 13, 1949.

There is evidence to support this. (Ap. 175.)

> 8. That before leaving Kaunakakai on June 14, 1949, Captain Hagood told Yamamoto that he could have the vessel if he moved it away from the wharf.

Again we have a misquoting of the court's finding. The court found:

> "* * * and, while the full scope of the conversation was not disclosed, the part disclosed strongly indicated that he told Yamamoto he could have the boat if he moved it away from the wharf to his lot. *In any event the vessel was taken to Yamamoto's inland yard at some later date.*"[8] (Italics added.)

It is submitted that there is substantial evidence in the record to warrant the court's finding hereon, keeping in mind that the language of the district court was not couched in such specificity as appellant would have this court believe.[9]

> 9. That Captain Hagood testified that he would not have accepted the wreck as a gift.

With respect to this finding it should be pointed out that the same is substantiated in the testimony (Ap. 58).

Moreover, counsel for appellant failed to make any objection to this testimony.

---

[8]Ap. 20-21.
[9]Ap. 56-57.

"Q. So that the vessel, when you last saw it, was or was not in a seaworthy condition?

A. It was definitely not in a seaworthy condition. In fact, it had no further value to me as far as I could see. I wouldn't have taken it as a gift at that point." (Ap. 58.)

10. That the vessel's sponsons were crushed by respondent-appellant in righting the vessel at Kaunakakai wharf.

11. That neither party replied to a letter of King, Limited, dated July 16, 1949, stating the company's intention to cannibalize and destroy the vessel.

Appellant complains that the trial court may have drawn unfair inferences from the above.

In view of the court's opinion as to the conduct of the appellant on June 11-13,[10] these issues would have no bearing on the result of the case, and even if such findings were erroneous, they do not constitute prejudicial error, which would warrant a reversal herein.

12. That respondent-appellant questioned the right of libelant-appellee to refuse to take over the vessel at Kaunakakai.

This was not a finding of fact by the court, as appellant's brief would indicate, but is the preface in the district court's "opinion and conclusions"[11] and

[10]Ap. 22.
[11]Ap. 21.

needs no further consideration at this stage of argument.

> 13. That respondent-appellant undertook to salvage the vessel after receiving notice of abandonment.

It is submitted that there is substantial evidence in record to warrant such a conclusion by the court.

But even if there were no abandonment at all by appellant, appellee, by its conduct in removing the vessel from the beach, authorizing $1,500 worth of rescue and salvage and towing, and then to abandon the vessel at sea, when the money limit had been used up, cured the defect.

> 14. That respondent-appellant abandoned the vessel at sea.

Appellee cannot emphasize too strongly the correctness of the court's conclusion with respect to this point.

For by the time appellant gave "no further instructions" to the salvage tug, it certainly had notice of appellee's abandonment.

Appellant would shrug this off by its statement "thus rejecting her abandonment"; (Appellant's Brief, 38) but the record is abundantly and eloquently clear to the effect that it was appellant who took the vessel off the beach at its own responsibility; and it was appellant who left the insured vessel at the mercy of the high seas, and turned over its control

unto the salvage tug. The very terms of the charter party[12] and callous "no instructions" from the insurer indelibly stamp this conduct as going beyond rescue attempts; assuming control over the vessel, and in law effecting a waiver of any abandonment, and constituting an acceptance of appellee's abandonment.

Appellant's conclusion that the vessel was well on her way to a safe port (Appellant's Brief, 39) is naive to say the least.

Yes, the vessel was towed off the reef—but it immediately turned turtle upon reaching deep water—and this rendered the salvage attempts *a failure*—for it was now impossible to tow the vessel to Honolulu.[13]

She was taken to a "safe" port, not on any instructions from appellant—but from instructions from the home office of the tug Maizie-C, attempting to tow the vessel to Honolulu.[14]

Our Supreme Court has said:

> "The defendants complain, however, that they have been held liable as for a constructive loss,

---

[12]See Charter Party, Ap. 80, 82:

> "e. It is expressly agreed between the parties that if said salvage operations have not been successful at the time charges for the use of the Maizie-C, including charges for the return to Honolulu, amount to $1500, *said operations are to be abandoned* and the Maizie-C is to return forthwith to Honolulu, unless Charterer through its agent on the spot, authorizes a continuation of said operations in writing." (Italics added.)

[13]Ap. 52, 53, 56, 61, 62, 68, 69.

[14]Ap. 68, 69.

when there was no right to abandon, and when the abandonment of which the plaintiff gave notice was not accepted. * * * It is an established fact that there was no right to abandon when they did take possession of the vessel. And it was expressly stipulated in the policy that acts of the assured, or insurers, or of their joint or respective agents, in preserving, securing or saving the property insured, in case of danger or disaster should not be considered, or held to be a waiver or acceptance of abandonment. It is well settled, however, that an offered abandonment may be accepted, even when the assured has no right to abandon, and if accepted, it must be with its consequences. And an acceptance need not be expressly made. *It may even be refused, and yet the insurers, by their conduct, make themselves liable as for a total loss.*" (Italics added.)

Phoenix Insurance Co. v. Copelin (1869), 76 U.S. 461, 10 L.Ed. 739, 741.

C. APPELLANT'S CONTENTION THAT EXPENSE OF RECOVERING AND REPAIRING THE VESSEL WOULD NOT EXCEED $21,000.

It is admitted that appellee presented no evidence as to expense of recovering and repairing the vessel.

We rest on the proposition:

1. That the assured need not recover and repair to ascertain the cost thereof, before he can abandon; particularly when

2. The insurer *by its conduct* makes itself liable and by its conduct waives any defect in that abandonment, even if the abandonment be improper when tendered.

We shall deal with this, appellee's main point, below, and mention it at this point in our brief only to match the chronology and subject matter as treated by appellant.[15]

Appellant's reference to the condition of the Miss Philippine on June 13, 1949 (Appellant's brief, 48), is, however, noteworthy of mention, for by this time appellee itself has abandoned the carcass of the vessel to the high seas or mercy of a third party.

II. APPELLANT'S CONTENTION THAT FAILURE OF APPELLEE TO ACT FOR THE DEFENSE, SAFEGUARD AND RECOVERY OF THE INSURED VESSEL BARS HER RECOVERY.

Appellant urges that under the "sue and labor clause" of the insurance policy appellee had the duty to attempt to rescue the vessel and because of its failure so to do is barred from recovery hereunder, and has assigned two grounds of error therefor.[16]

This clearly misconceives the function, purpose and effect of the sue and labor clause.

It does not mean that simply because a ship owner fails to make rescue attempts he is *ipso facto* barred from recovery on his policy.

Even in the case of *Searles v. Western Assur. Co.*[17] cited by appellant, the court said:

> "We do not say that appellant was compelled to make an effort to save the vessel before he

[15]See, *infra*, LAW APPLICABLE TO THIS CASE.
[16]Appellant's Brief, page 49. Assignments of error 22 and 23.
[17]40 So. 866, 869.

could abandon and sue, but we do say that the conditions warranting him in abandoning it must have existed, and must have been proven by him to exist."

The district court concluded that appellee's judgment in abandoning her on the beach was justified under the circumstances and was "vindicated by every subsequent event."[18]

For in the instant case, appellee first contemplated rescue operations, and then after a more thorough investigation of the wreck decided against it.[19]

Yes, it might well be that appellee's failure to attempt rescue or salvage might have a bearing under other circumstances; but

1. The ship owner's decision was based upon his judgment that rescue operations were hopeless;

2. Subsequent events, as to the capsizing of the vessel and the impossibility of returning her to Honolulu confirmed that judgment; and

3. The conduct of appellant cured and waived the defect, if any, in any event;

4. Where there is acceptance of abandonment, the ship owner need not justify the abandonment.

If the circumstances of the stranding justified an abandonment, the assured need not "sue and labor" or attempt to rescue.

---

[18]Ap. 21-23.
[19]Ap. 64.

And if there be acceptance of abandonment, he need not justify the abandonment. Or if the conduct of the insurer were such as to amount to acceptance or waiver of abandonment, the insurer becomes liable as for a constructive total loss.

III. APPELLANT'S CONTENTION THAT THE ACTS OF APPELLANT IN RECOVERING, SAVING AND PRESERVING THE INSURED VESSEL DID NOT CONSTITUTE ACCEPTANCE OF HER ABANDONMENT.

Appellant is in effect urging its action went merely to rescue and save the vessel and then turn her over or back to the assured.

There is not the slightest bit of evidence in the record however to substantiate this theory.

Appellant did succeed in floating the wreck—but it went beyond just salvage attempts.

It authorized a towing job with a $1,500 limit and then when the limit was reached abandoned the wreck on the high seas.

The skipper of the rescue tug could have cut the tow line, at this stage, and would have, except he was afraid it might become a navigational hazard. Where the vessel was tied up was decided not by appellant but by the skipper of the salvage tug. In other words, by this time appellant had washed its hands of the Miss Philippine. Upon being notified that the vessel was tied up at Kaunakakai, appellant dashed back into the picture, had the vessel righted and tied up;

and then profoundly advised appellee that it was still her boat.

This is the theory appellant advanced without success before the trial court, and, it is respectfully urged, warrants no consideration before this court.

Once the abandonment is accepted, the rights of the parties are fixed—and once appellant's conduct amounts to acceptance or waiver of abandonment then again the rights of the parties are fixed.

This case is that simple.

> "Acceptance of an abandonment by the insurer fixes the rights of the parties, and all questions in regard to its seasonableness or sufficiency must be considered waived. An acceptance of an abandonment whether express or implied, precludes the contention that the vessel was not damaged by a peril insured against, or that it was not a total loss. An offered abandonment may be accepted, even if the insured originally had no right to abandon."
>
> Appleman, *Insurance Law and Practice,* Vol. 6, p. 79, citing cases.

> "An abandonment once made and accepted fixes the rights of the parties, and renders the insurers liable as for a total loss. * * * The title of the vessel passes to the insurers under such circumstance." And once there is acceptance of the abandonment by the acts of the insurer, "it is too late for it to recede."
>
> *Richelieu & O. Nav. Co. v. Ins. Co.* (Mich. 1888), 40 N.W. 758, 764.

> "If the abandonment was accepted, which seems to be the only serious question, all question in regard to its seasonableness or sufficiency must be considered as waived."
>
> *Reynolds v. Ocean Ins. Co.,* 39 Mass. 191, 199.

The provision in the policy, so strongly relied upon by appellant that:

> "nor shall the acts of the Assured or Insurers, in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment,"[20]

does not give the insurer the right to take possession of the vessel and decide for the owner what shall be done with her,

> "but on the contrary, when the insurer takes possession he is under the duty of disposing of the vessel in the manner provided by the policy, and in default thereof, is held to have accepted the abandonment."[21]

Here the insurer took it upon itself to float the vessel, put her under a charter party with a money limit, and after the running out of the money limit abandoned her at sea.

Nowhere, under law, or under the authority of the insurance policy, can appellee find justification for its conduct in that respect—and strangely enough,

---

[20]Appellant's Brief, p. 55.

[21]*Alliance Ins. Co. v. Producers' C. Oil Co.* (Miss. 1915), 67 So. 58, 60.

nowhere in appellant's brief do we find appellant meeting that very issue.

Unless, of course, appellant wishes to urge that its "no instructions" while the vessel was being towed, and which conduct was declared by the trial judge to amount to abandonment was an act in "recovering, saving or preserving" the vessel.

Appellant cites many cases in support of its contention.

It relies, for example, on *Washburn & Moen Mfg. Co. v. Reliance Ins. Co.*[22] where the court went on to say

> "and what was done * * * was no more than it had the right to do." (Ap. p. 19.)

Hardly comparable to the case at bar where the insurer clearly went beyond any act of just recovery, saving or preserving.

In the case of *American Merchant Marine Ins. Co. of N. Y. v. Liberty Sand & Gravel Co.*[23] it was held that although the marine policy declared that insured should not have the right to abandon the vessel, thus abrogating right to do so and make claim for total loss on proof that cost of restoring vessel would exceed half her value, and though on tender by insured of abandonment insurer refused acceptance, yet where insurer thereafter raised the craft and put her on

---

[22]179 U.S. 1.

[23]282 F. 514 (CCA N.J. 1922) cert. den. 43 S. Ct. 96, 260 U.S. 737, 67 L. Ed. 489.

dry dock, and then later floated her to place from which she had been raised, removed plugs and sunk her, such action was held to amount to constructive acceptance of abandonment.

Appellant complains that the pleadings raised no issue of acceptance of abandonment.[24]

It should be noted, however, that the parties were in court, and all issues herein were litigated before said district court. Moreover, appellant failed to raise such point during the proceedings below; failed to incorporate such matter in its statement of points on which appellant intends to rely on appeal;[25] nor in its 32 assignments of error.[26]

Nor did the judgment go beyond such issues nor beyond the scope of the relief demanded.

Appellant cites the *Soelbery v. Western Assur. Co.*[27] case, decided by this court, for the proposition that the acts of the insurer were protected by the sue and labor clause—but even there this court was quick to note that there were no acts performed beyond the powers conferred by the clause.

That is hardly the case here where the insurer clearly took over on its own and abandoned at sea.

And too, in the case of *Chicago S. S. Lines v. U. S. Lloyds,*[28] cited by appellant, the court said:

---

[24]Appellant's Brief, p. 55.
[25]Ap. 205.
[26]Ap. 31.
[27]119 F. 23.
[28]2 F. (2d) 767.

> "Neither party, however, is permitted to take refuge under this clause (that acts of insurer or insured shall not be considered as waiver or acceptance of abandonment, etc.) from the consequences of inconsistent conduct." (Parenthetical matter added.)

The court therein noted that the insurers at no time took possession and control of the ship. That is not the situation that obtains here.

The *Jeffcott*[29] case cited by appellant also refers to cases where insurers have been held under a theory of constructive acceptance of abandonment where they "are based on facts showing some exercise of dominion over the vessel inconsistent with the position of an insurer."

Clearly the case here.

In any event, appellant would sweep all this away by urging that the acts of appellant were completed before any tendered abandonment—which we urge is not supported by the record—and that in any event, the acts of the insurer were so inconsistent with those of an insurer as to constitute a waiver or acceptance of any abandonment.

---

[29]*Jeffcott v. Aetna Ins. Co.*, 32 F. Supp. 409, Appellant's Brief, p. 60.

THE LAW APPLICABLE TO THE CASE.

Appellee contends that the following propositions of law, namely:

1. That an insurer may *by its conduct* accept or waive abandonment; and
2. That if it does,
   a. whether or not the vessel was a constructive total loss under certain fixed money limitations,
   b. or whether or not the assured attempted to rescue or salvage,

   is immaterial,

are well established propositions of law, applicable to the case at bar, and that the decision of the district judge was in consonance with the applicable authorities and the facts of this case.

Appellant *admits* the charter party agreement, its agreement to pay not more than $1,500 in salvage charges, and that it refused to give the salvor further instructions when the amount was used up while the vessel was under tow on the high seas.[28]

The district court properly concluded that such conduct on the part of the insurer amounted to an abandonment at sea of the insured vessel by the insurer.[29]

If this court agrees, then no other matter need be considered. For such conduct is clearly an act in-

[28]Appellant's Brief, p. 54.
[29]Ap. 22.

consistent with the dominion, control and possession of the assured, and goes beyond any authority vested in the insurer by the policy.

It fixes the rights of the parties; and that the insurer came in later, after the vessel was tied fast by the salvage tug, does not dispose of the insurer's abandonment of the day before, and amounts to a constructive acceptance of appellee's abandonment—nay it amounts to a waiver of any abandonment, even if this court should decide that appellee's abandonment came too late, and we contend it did not.

For, the charter party agreement, the floating of the wreck off the beach, the towing at sea, the refusal to give further instructions, the continuation of the tow to Kaunakakai, the tying up there, were all done without the consent or authority of appellee, and were acts not consistent with that of an insurer.

When appellant notified the rescue tug that it had no further instructions, it abandoned the wreck to the high seas, it waived abandonment or any defect therein, by appellee, for it had exercised all the elements of control, possession, dominion and ownership over the insured vessel.

By its conduct it clearly made itself liable as for a constructive total loss.

It cannot seek the protection of the sue and labor clause nor of the $21,000 cost of repairs definition of constructive total loss.

Its conduct has taken it far from beneath the umbrella of protection of those clauses.

See:

Appleman, *Insurance Law and Practice,* Vol. 6, p. 79 and cases cited;
Eldridge, on Marine Policies, pp. 189, 190;
Cinc. Ins. Co. v. Bakewell, 43 Ky. 541.

One of the leading cases in support of appellee's contention is *The Phoenix Insurance Company v. Copelin.*[30]

We submit the case as authority for the position being urged herein by appellee.

There the court held the insurance company liable notwithstanding a provision in the policy that the acts of the insurers, in preserving, securing or saving the property insured should not be considered or held an acceptance of an abandonment. That provision was held to refer only to authorized acts.

Appellant urges that this case is not applicable to the case at bar.[31]

Appellee urges, however, that the case is in point and decisive herein.

Furthermore, Mr. Justice Story's opinion in the case of *Peele v. Merchants' Ins. Co.*[32] covers the situ-

---

[30]76 U.S. 461, 10 L. Ed. 739, *supra.*
[31]Appellant's Brief, p. 57.
[32]19 Fed. Cases, No. 10,905, p. 98.

ation here notwithstanding appellant's pronouncement to the contrary.[33]

Taking possession and control of the vessel, floating and towing her to abandon her at a fixed price limit are not within the contemplation and protection of the clauses being urged herein by appellant.

> "The question then comes to this, whether the underwriter has a right, in case of stranding, without the consent of the owners, to take the exclusive possession and management of the ship, and afterwards to retain and repair the ship on account of the owners. If he has not, then the exercise of such a right can stand only upon the acceptance of the abandonment as a transfer of property. * * * Has the law ever contemplated that he can take possession of the ship and decide for the owner what shall be done with her?"
>
> *Peele* case, *supra,* p. 118.

Even if there had been no abandonment by appellee, appellant would be liable here, for it acted not as an insurer, but as owner.

Mr. Justice Story continues to put the case aptly, and it is as good law today, as then (1822):

> "If, when a ship is abandoned, the underwriters do not choose to accept it, they have a right to lay by and wait the event. They are to act in this, as in all other cases, according to their sound discretion. If the owners have abandoned without just cause, the underwriters are not prejudiced by leaving the ship as she is. * * *

[33]Appellant's Brief, pp. 55, 56.

> If after abandonment, the owners were to proceed to repair the ship without consultation with the underwriters, it would be a waiver of the abandonment, because it would be doing an act inconsistent with the asserted transfer of ownership. It would deprive the underwriters of the right of electing whether to repair the ship or not and thus compel them to spend their money in a way which they might deem useless. The same principles must govern, when like acts are done by the underwriters * * *."[33]
>
> (*ibid.* p. 119.)

Appellee contends that the conduct of the insurer went beyond the contemplation, authorization and protection of the provisions of the policy; that its acts were inconsistent with that of an insurer, and that by its conduct it waived abandonment.

In summary: appellee rests upon the contention that the acts of the insurer went beyond the protection, authority and contemplation of the insurance policy; were acts inconsistent with those of an insurer; that upon abandonment by the insurer of the insured vessel on the high seas, abandonment by the assured was waived or accepted; and that the rights of the parties were fixed as of that moment.

That appellant should not be heard that it tendered back the insured vessel, safe and sound, before any abandonment by the assured.

---

[33]See also:
American Merchant Marine Ins. Co. v. Liberty S. & G. Co., 282 F. 514, *supra;*
Hume v. Frenz, 150 F. 502.

That appellant's claim:[34]

> "That its acts of saving the vessel were, in point of fact, completed before the appellee even tendered abandonment"

is without justification in the record.

CONCLUSION.

Whether the acts of the insurer amounted to an acceptance or waiver of abandonment is a mixed question of law and fact.

The opinion of the district judge, before whom all the evidence was presented in open court, and who is familiar with Hawaiian waters where the stranding occurred is entitled to great weight here.

The decision of the lower court should not be reversed unless it clearly appears that the decision was contrary to the evidence.

We contend that the evidence in this case leads to the overwhelming conclusion that the insurer, by its conduct accepted or waived abandonment, and that the decree appealed from should be affirmed.

Dated, Honolulu, Hawaii,
October 23, 1950.

Respectfully submitted,
HYMAN M. GREENSTEIN,
Proctor for Appellee.

---

[34]Appellant's Brief, p. 61.

(Appendices A, B, and C Follow.)

Appendices.

Appendix A

Charter Party[1]

Whereas the sampan Miss Philippines is aground in the ocean at Kaupo, Maui, Territory of Hawaii, and

Whereas, Indemnity Marine Assurance Company, Limited, hereinafter known as Charterer, is the Insurer of said sampan, and desires that an attempt be made to float and tow same to a Marine Railway at Honolulu, Territory of Hawaii aforesaid, and

Whereas, King Limited, a Hawaiian Corporation of Honolulu, Hawaii hereinafter known as Owner, owns the oil screw Maizie-C, and is willing to let the use of same to Charterer upon the terms and conditions which appear below,

Therefore it is hereby Mutually agreed by and between Charterer and Owner, as follows:

1. Charterer agrees to hire and Owner agrees to let the oil screw Motor Boat Maizie-C, official number 236082, for the purposes and on the conditions hereinafter set forth.

2. The said vessel Maizie-C shall get underway from Honolulu on or about June 10th, 1949, and proceed to Kaupo, Maui, and there control of said vessel shall pass to Mr. Gallagher, American Bureau of Shipping Surveyor, as agent for the Charterer, and the proposed salvage operations shall be conducted by his authority and under his direction. In the event

[1]Ap. 80.

that these are successful the Master of the Maizie-C shall then tow Miss Philippines to a Marine Railway at Honolulu aforesaid.

3. Charterer agrees to pay as hire for the said Maizie-C, her crew and equipment, without discount, the following sums:

a. $15.00 per hour for the hire of the Maizie-C and her three regular crew members, computed from the time she is underway at said Honolulu, until she is again secured in said Honolulu at the end of her voyage.

b. $1.00 per hour for the hire of each of three additional crew members, their time to be computed as provided for the Maizie-C in sub-paragraph a. (above).

c. $100.00 for the additional insurance premium which is to be charged the owners of the Maizie-C as a result of the said use.

d. Any and all other expenses incurred by the Maizie-C, her owner or agents, as a result of the said use and which are reasonably necessary thereto.

e. It is expressly agreed between the parties that if said salvage operations have not been successful at the time charges for the use of the Maizie-C, including charges for the return to Honolulu, amount to $1,500.00, said operations are to be abandoned and the Maizie-C is to return forthwith to Honolulu, unless Charterer, through its Agent on the spot, authorizes a continuation of said operations in writing.

4. Salvage attempts are to continue so long as said Mr. Gallagher deems same feasible, subject, however, to the provisions of paragraph 3. e. above.

5. If Miss Philippine is damaged or lost during the salvage operations the Charterer shall be responsible therefor, and said Charterer hereby covenants to hold the Owner harmless on account of any claim as a result of such damage or loss.

6. Charterer, in consideration of the use of the Maizie-C, her tackle, engines, and crew, expressly agrees to pay for same as specified in paragraph 3 above, regardless of the success of operations and without set off in the event said Miss Philippine is damaged, destroyed or lost as a result of said operations or towage, even though such damage or destruction or loss is the result of the negligence of Owner, its agents or servants.

Wherefore, the parties hereto have set their hands this 11th day of June, A. D. 1949.

Indemnity Marine Assurance Company, Ltd. By its General Agent The Bonding and Insurance Agency, Ltd. (a Hawaiian Corporation)

By /s/ A. H. Matthew,
Its Charterer.

King, Limited,

By /s/ James T. McAndrews,
Its Secretary.

Owner.

Admitted January 16, 1950.

Appendix B

Findings as Gleaned and Construed from Evidence[2]

Libelant was the owner of an oil screw vessel named "Miss Philippine", an exaggerated type of sampan, built and registered at Honolulu, Hawaii, in 1947. The vessel was adapted for and used by the owner, with other vessels, in off-shore fishing. Agents or representatives of the respondent came to libelant's home and solicited the writing of insurance on said vessel, and on December 8, 1948, an insurance policy was written by respondent in favor of libelant-owner to cover for a year, a total or constructive total loss in the payable sum of $10,500. Prior to December, 1948, another insurance agent's company had carried a more comprehensive policy for a year at a higher rate, 8%, but had not notified libelant of its expiry or solicited its renewal. The payee of the present policy, in event of loss, was Bank of Hawaii, a party in interest as mortgagee at the time, and the policy was delivered by respondent directly to the bank. Neither the libelant or Telesforo Cadiente, her husband, agent and business manager, ever saw the policy or the addendum rider clipped thereto, which rider requires "that in ascertaining whether the vessel is a constructive total loss $21,000 shall be taken as the repaired value". It was in no manner explained to either of them in any of its terms and they were given no opportunity to read it, being told

[2]Ap. 13.

the policy covered total and constructive total loss in the sum of $10,500. The premium of $315 was paid.

On Monday, June 6, 1949, said vessel was stranded by reason of the displacement and loss of her propeller and rudder and, dragging her anchor, she was driven by the sea onto a boulder-strewn, isolated beach at Kaupo, Island of Maui, Hawaii, so that she lay athwart or transverse to the sea and was being pounded and heavily rocked by a fairly high sea. As soon as her master could obtain a means of communication he notified the U. S. Coast Guard on that island who in turn communicated information of the stranding to the husband and managing agent of the owner at Ewa, Oahu. Apparently, this information was communicated the same day to the respondent and to King, Limited, a tugboat operator at Honolulu. A Coast Guard craft went to the scene and from the sea looked the situation over and reported to the master that they could do nothing toward an attempt to draw the vessel off the rocky beach as the sea was running too high.

The owner's agent, Telesforo Cadiente, went to Maui the following day by plane and by automobile reached the beach where the vessel was stranded. He and the master of the stranded vessel made what inspection and examination they could from the shore and saw she was rocking heavily between large boulders and that part of her hull was stove and the sea was surging through her. They could not board her as the sea was running high and throwing water over her.

Before leaving Honolulu, Cadiente was approached by Charles P. Hagood, master of King, Limited's tugboat "Maizie C", who told him he would like to go to Maui and look at the stranded vessel, and asked libelant's agent to pay his passage for that purpose as he believed he could get the vessel off the rocks and bring her to Honolulu. Cadiente paid Hagood's transportation and, after arriving at Maui, Hagood chartered a small airplane and was flown to the site of the vessel and circled over and around it several times at low altitude. Upon landing he told Cadiente that he believed he could get the vessel into the sea and tow her to Honolulu. A tentative oral agreement was made that he proceed.

The following morning, Wednesday, June 8, Cadiente and the vessel's master and crew again visited the vessel. On this occasion they were able to get on board and make a more intimate examination, although she was still being heavily rolled between the boulders and was much more damaged than the day before. A number of her ribs were broken and some carried away on the port side, amidship and aft; her keel was badly battered and damaged with parts carried away; water was surging through the engine room; and she was firmly wedged between boulders, being broken more with each heavy sea that struck her.

Cadiente and the vessel's master came to the conclusion as a result of this inspection that it would be a hopeless and unjustifiable risk to undertake salvage and rebuilding of the vessel and Cadiente decided

then and there to abandon her as a total loss, and told the crew to return to Honolulu. He telephoned to Captain Hagood not to come to Maui with his tug, the "Maizie C", to undertake salvage operations and told the Coast Guard office as well that he was abandoning the vessel and to tell Hagood and the Insurance Company. He then returned to Honolulu and again told Hagood not to take the "Maizie C" to Maui, that he had abandoned the boat.

The morning of June 9, he went to get advice as to the feasibility of rebuilding the boat from J. Tanimura, the proprietor of Kewalo Shipyard, who had built the boat in 1947, and after discussing with Tanimura the position and condition of the vessel and getting the advice of the builder he was confirmed in his judgment and decision of abandoning her as an irredeemable total loss.

That evening at 8:00 p.m. he received a letter dated June 9, signed Mr. A. H. Matthew, office manager of the agents of respondent, advising him that the sampan "Miss Philippine" was stranded at or near Pauhana, Maui, and that he "proceed with salvaging of this vessel in accordance with the conditions of the above policy."

The morning of Friday, June 10, he called on Mr. Matthew at his office and told him that he had talked with the builders and the Coast Guard and had reached a definite decision that it would be an unwarranted risk and useless for him to undertake to salvage and rebuild the boat, and he had abandoned her and had, before leaving Maui on the 8th, asked

the Coast Guard to so advise the agents of the insurance company of such surrender.

At Mr. Matthew's request he went the same day to the office of the insurance agents' attorney, Thomas Waddoups. There he was asked if he was abandoning the sampan and he said, "Yes", he had abandoned it. Then Mr. Waddoups told him to get a lawyer and he was told to come back on Monday, the 13th, and bring his wife. He attended the Monday meeting. A number of persons were then present at Mr. Waddoups' office and he learned that the insurance company had two days prior entered into a charter party with King, Limited, to send the tug "Maizie C" to Maui to undertake salvage operations under control of a Mr. Gallagher, a ship surveyor, as agent for the respondent. The following day libelant's attorney wrote respondent demanding $10,500 for total loss under the policy.

The charter party above mentioned was put in evidence as libelant's Exhibit "B". It provided that an attempt be made to float the sampan and tow her to a Marine Railway at Honolulu, the owners of "Maizie C", an oil screw motorboat, to be paid $15 per hour for hire with three regular crew and $1.00 per hour for three additional crew, also $100 for additional insurance protection, and any and all other expenses incurred by her owner, or agents, which were reasonably necessary to the undertaking; provided, on express agreement, that if salvage operations were not successful at the time charges amounted to the sum of $1,500, including charges for the tug's

return to Honolulu, the salvage operations were to be abandoned and the "Maizie C" was to return forthwith to Honolulu, unless the Charterer or its agent on the spot authorized a continuance of said operations in writing; and if "Miss Philippine" was damaged or lost during the salvage operations the Charterer would be responsible therefor.

Salvage operations under the charter and otherwise were begun at Kaupo, Maui, on Saturday, June 11, under the directions of Mr. Gallagher. The sea had quieted down considerably, although the beach is always exposed to channel currents. Several large-sized air bags were brought ashore from the "Maizie C", together with a small air compressor for inflating them. The bags were secured under deck and inflated. Mr. Gallagher procured the services of a heavy-duty bulldozing machine and its operator and brought it to the beach. The bulldozer pushed and the "Maizie C" pulled; eventually, the boat was turned with prow toward the sea and was pushed and pulled several hundred feet until she had reached sufficient depth for the "Maizie C" to pull her into deep water. A photograph was exhibited to the Court showing the powerful bulldozer a considerable distance from the shore in what appeared to be a perilous position with spray flying over it, but apparently this picture was not put in as an exhibit. Upon reaching deep water the vessel capsized, turning completely upside down. This resulted in a serious towing problem for the "Maizie C", a motorboat. Towing was begun, however, along the lee side of Maui by

nightfall of June 13 she had made, at a rate of about four miles per hour, 40 to 45 miles, to a point near Lahaina. From this point forward the tow would have to leave the lee of Maui and encounter rough seas, first in the Pailolo Channel running between Maui and Molokai, and then, if he tried to make Honolulu with his heavy tow, in the wider Kaiwi Channel between Molokai and Oahu. Hagood thought it would be very difficult and problematical of success to cross both channels. By this time the $1,500 limitation fixed by the Charterer had become exhausted; he radiophoned from his boat to his company telling his position and the situation. His company took the matter up with the respondent and received a statement from it that it had no further instructions beyond the terms of the Charter.

Upon learning this Captain Hagood considered himself in a serious predicament for he knew that if he cut the tow loose he would be liable for creating a derelict on the high seas. He said he was apprehensive that if he attempted to tow the wreck to Honolulu it might break up in the rough channel. He asked further instructions from his owner and was told to try to get the boat into a safe harbor, and tie her up, but to use his discretion. He could have taken her to Moala or other ports nearby on Maui, but he decided to try to make Kaunakakai on Molokai, where a friend of his named Yamamoto had a small boatbuilding business and where the wharf was equipped with two heavy cranes. He arrived there the next day, Tuesday, June 14, and tied the wreck to the wharf.

The same day Mr. Gallagher and C. G. Chipchase, an officer of respondent, flew from Honolulu to Kaunakakai and made arrangements with California Packing Corporation, which operates the wharf, to have the boat slung, lifted and warped to an upright position, and then returned to Honolulu. Before Captain Hagood left Kaunakakai he visited his friend Yamamoto and discussed the situation and, while the full scope of the conversation was not disclosed, the part disclosed strongly indicated that he told Yamamoto he could have the boat if he moved it away from the wharf to his lot. In any event the vessel was taken to Yamamoto's inland yard at some later date. Captain Hagood testified that he would not have accepted the wreck as a gift, but that Yamamoto thought it had some salvage value to him. Upon lifting and turning the vessel over, further damage was done in crushing her sponsons, a protruding part of the hull, by compression of the slings.

On July 16, King, Limited wrote to the attorney for the libelant saying they were in receipt of a letter from the Board of Harbor Commissioners directing them to remove the "Miss Philippine" from alongside the wharf at Kaunakakai and telling the attorney that if his client as well as the insurer claimed no further interest in the vessel it was the intention of King, Limited to "cannibalize and destroy" the vessel. Apparently no reply was received from either party.

Appendix C

Opinions and Conclusions[3]

The respondent questions the right of the libelant to abandon the vessel on the beach at Kaupo, Maui, and his refusal to take her over at Kaunakakai, Molokai, but I believe his judgment in abandoning her on the beach was vindicated by every subsequent event, and that there certainly was no duty on libelant to seek her possession after respondent had abandoned her at sea.

When the insurer, thinking its judgment was best, after notice of libelant's abandonment, took her into its control on June 11 and bulldozed her off the beach and then abandoned her carcass at sea two days later in an upturned position, she was a derelict at the mercy of the sea, save for the acts of King, Limited, which then took her in a new charge with right of ownership as salvor and towed her remains to a harbor of its selection where she was tied fast to a wharf. The fact that the insurer's agents came in afterwards and had her righted, keel down, does not dispose of their abandonment of her at sea the day before, for this to my mind was a clear and constructive acceptance of libelant's abandonment and respondent's claim of right of disposition. On June 14, King, Limited, were dealing with the wreck as their problem and no showing was made that the

[3]Ap. 21.

insurer had the consent of King, Limited, to touch a hand to her at Kaunakakai.

The evidence of Mr. Gallagher that she might have been repaired for $7,500 was in no manner convincing. The "human probabilities rule" as to the cost of getting her off the beach and her condition thereafter, and the cost of getting her into a marine railway at Honolulu and repairing her to good and staunch seaworthy condition, are not of value in the facts of this case, where "human probabilities" could be so highly colored by guesswork alone. The libelant's manager believed, in effect, that he would be putting good money after bad in experimenting further with such an uncertainty and this view was confirmed after he discussed the matter with the boat's builder. I am convinced that he would have made the same decision if he had had no insurance policy. The respondent, which had $10,500 at stake as to the question of a total loss, seems to have come to the same conclusion on June 13, that salvage was hopeless; for it was then responsible for the position of the wreck and, in response to request for instructions, gave it to the sea or to King, Limited.

My conclusion is that the libelant was justified in abandoning the wreck and gave notice of such decision timely and that he was justified in refusing to have the wreck wished on him at a later date after abandonment at sea by the respondent. There is no question that an insurer may by its conduct make itself liable for a total loss and it is my opinion that the

respondent is liable for payment of a constructive total loss.

Judgment will enter accordingly.

Dated at Honolulu, Hawaii, April 19, 1950.

/s/ D. E. METZGER,
United States District Judge.

(Endorsed):
Filed April 19, 1950.

No. 12,574

IN THE

United States Court of Appeals

For the Ninth Circuit

THE INDEMNITY MARINE ASSURANCE COMPANY, LIMITED,
Appellant,

vs.

FULGENCIA D. CADIENTE,
Appellee.

Appeal from the United States District Court for the District of Hawaii.

REPLY BRIEF FOR APPELLANT.

THOMAS M. WADDOUPS,
ROBERT E. BROWN,
312 Castle & Cooke Building, Honolulu 1, Hawaii,
Proctors for Appellant.

ROBERTSON, CASTLE & ANTHONY,
312 Castle & Cooke Building, Honolulu 1, Hawaii,
Of Counsel.

Subject Index

Table of Authorities Cited

No. 12,574

IN THE

United States Court of Appeals

For the Ninth Circuit

THE INDEMNITY MARINE ASSURANCE COMPANY, LIMITED,
Appellant,

vs.

FULGENCIA D. CADIENTE,
Appellee.

Appeal from the United States District Court for the District of Hawaii.

REPLY BRIEF FOR APPELLANT.

INTRODUCTION.

The brief filed on behalf of appellee makes little pretense at rebuttal of appellant's first two points, viz.:

I. The insured vessel was not a constructive total loss when appellee tendered her abandonment;[1] and

II. Failure of appellee to act for the defense, safeguard and recovery of the insured vessel bars her recovery.[2]

---

[1]Brief for Appellant, pp. 12-49.
[2]*Id.* pp. 49-53.

It is readily apparent throughout her treatment of these points that appellee, on this appeal, relies entirely upon the theory of constructive acceptance of abandonment for her recovery herein.

Appellee admits frankly that she made no attempt to prove the expense of recovering and repairing the vessel, offering no evidence on that issue.[3] This admission confirms what is already patent on the face of the record, that appellee failed to carry her burden of proving a constructive total loss of MISS PHILIPPINE within the terms of her insurance policy. Since the only ground for recovery set forth in appellee's libel was the allegation that "said vessel did become a constructive total loss within the meaning and coverage of said marine insurance policy" (R. 3), and since the final decree appealed from was entered by the court below on the basis of its opinion and conclusion that appellee "was justified in abandoning the wreck" (R. 23), both decision and decree thereon were clearly erroneous.[4]

Appellee also concedes that she made no effort to rescue the stranded vessel and left her to eventual destruction on the rocks,[5] notwithstanding the availability of reasonable means of salvage which appellant demon-

---

[3]Brief for Appellee, pp. 6, 9, 17.

[4]*Klein v. Globe & Rutgers Fire Ins. Co.*, 2 F. (2d) 137 (C.C.A. 3d 1924);
Fireman's Fund Ins. Co. v. Globe Nav. Co., 236 Fed. 618 (C.C.A. 9th 1916);
Standard Marine Ins. Co. v. Nome Beach L. & T. Co., 133 Fed. 636 (C.C.A. 9th 1904);
Soelberg v. Western Assur. Co., 119 Fed. 23 (C.C.A. 9th 1902);
Chicago S.S. Lines v. United States Lloyds, 2 F. (2d) 767 (N.D. Ill. 1924), *aff'd* 12 F. (2d) 733 (C.C.A. 7th 1926).

[5]Brief for Appellee, p. 19.

strated successfully. Having thus failed to use with prudence and honesty the means at her command for saving the vessel and thereby minimizing the loss, appellee will not be permitted to capitalize on her own lack of care and diligence by recovering for a constructive total loss[6]—particularly when appellee has not even tried to prove such a loss.

Hence the sole ground now advanced in support of a recovery by appellee on the insurance policy in question is simply that appellant, by its conduct, implicitly accepted abandonment of the insured vessel.[7] Specifically, appellee now urges that appellant's acts of rescuing the sampan from her perilous position on the rocky beach, of financing her salvage and removal to a safe port, and of declining to exercise any control over her disposition by refusing to instruct the salvor after appellee had tendered abandonment, so exceeded the underwriter's authority conferred by the policy as to constitute constructive acceptance of abandonment.[8] There remaining—by appellee's confession—no other basis on which to justify the decree appealed from, appellant's argument will be addressed to this proposition alone.[9]

---

[6]*Chicago S.S. Lines v. United States Lloyds, supra;*
Howland v. Marine Ins. Co. of Alexandria, 12 Fed. Cas. 741, No. 6,798 (C.C.D.C. 1824);
Hundhausen v. U.S. Fire & Marine Ins. Co., 3 Tenn. Cas. 184, 17 S.W. 152 (1875).

[7]Brief for Appellee, p. 26.

[8]*Id.* pp. 26-27, 30.

[9]*See* Brief for Appellant, pp. 53-61.

ARGUMENT.

1. APPELLEE CANNOT RECOVER UNLESS DAMAGE EXCEEDS $21,000.

Nothing could be plainer than this stipulation contained in the policy:

> No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovering and repairing the Vessel shall exceed the insured value. (R. 7.)

Other stipulations therein fix the insured value at $21,000 (R. 7, 9). We submit that these terms of the insuring agreement mean just what they purport and must be given full effect accordingly; that is, unless expense of recovering and repairing the vessel exceeds $21,000, the assured cannot recover for a constructive total loss. Appellee admittedly failed to prove such expense. Therefore appellee is not entitled to recover for a constructive total loss.

The record is barren of any admission by appellant, express or implied, of such a nature as might obviate the necessity of proving that expense of recovering and repairing MISS PHILIPPINE exceeded the agreed limit. Appellant never conceded that to be a fact but, on the contrary, consistently denied the existence of such damage from the time its surveyor reported the stranded vessel to be salvageable (R. 129, 145). It demanded by letter of June 9, 1949, that appellee proceed with salvage (R. 111). It expended $1,500 for salvage and the additional cost of having the vessel righted at Kaunakakai (R. 159). It advised appellee's husband and agent on June 13, 1949, when he tendered notice of abandonment, that

it still looked to him to salvage the vessel (R. 189). And in reply to formal notice of total loss and abandonment, it reaffirmed its position that there was no constructive total loss (R. 104). Issue was joined on this ultimate fact (R. 3, 12).

This is but another instance where the assured, being bound by the lawful agreements and stipulations of her policy of insurance, has failed to establish her right to recover by showing a loss within the terms of that policy.[10]

---

2. RECOVERY MUST REST ON FACTS ALLEGED AND PROVED.

The verified libel by which appellee instituted this suit alleged that the insured vessel became a constructive total loss within the meaning and coverage of the insurance policy, that appellee duly performed all the conditions required of her by the policy, and that she was therefore entitled to receive the loss payable thereunder (R. 3). This last allegation is, of course, merely the pleader's conclusion; the first two form the ultimate, probative facts upon which that conclusion must stand or fall.

Now appellee says, in effect, that the veracity of these sworn allegations of fact is of no consequence, because her conclusion and the decree adopting it can be supported on another ground not mentioned in the libel. Under this freshly-conceived theory of suit, we are told, whether the vessel was a constructive total loss within the

---

[10] *Soelberg v. Western Assur. Co.*, 119 Fed. 23 (C.C.A. 9th 1902), and cases cited note 4 *supra*.

terms of the policy and whether the assured performed a vital condition imposed by that policy are immaterial.[11]

In short, appellee on this appeal, like the court below in its decision and decree, relies upon asserted facts quite different from those set forth in her libel as the basis for recovery on the policy. Both have resorted to complete juxtaposition of issues, the error of which is clear.

It is well stated that[12]—

> In all legal proceedings the judgment must be in accordance with the allegations and the proofs. The court will disregard all proofs outside the issues, and in pronouncing judgment will be restrained and guided by the allegations in the pleading.

In applying this established rule on review of a collision suit in admiralty, the Court of Appeals for the Seventh Circuit held that a respondent's answer alleged fault of libelant's steamer only in that its officers failed to hear or heed the ringing of a fog bell (which was disproved at trial); that the answer contained no averment that libelant's steamer was handled in a negligent manner without proper lookout (as claimed by respondent on appeal) or without coming to a stop (as suggested by the trial court); and there was therefore no pleading by respondent upon which the trial court could base its finding that the steamer was at fault.[13] Respondent's judgment was reversed and judgment for libelant directed.

---

[11]Brief for Appellee, p. 26.

[12]*Goodrich Transit Co. v. City of Chicago*, 4 F. (2d) 636, 637 (C.C.A. 7th 1925).

[13]*Id.* at 638.

And in another case in admiralty, the Supreme Court held that allegations of negligence in bad stowage and allowing water to leak into the ship's hold (which were not proved) could not support a recovery for injury to cargo found not attributable to those specified causes.[14]

Appellee's present contention serves only to emphasize the error of the District Court in considering issues other than those made by the pleadings and rendering judgment on such issues. It is axiomatic that[15]—

> A party is no more entitled to recover upon a claim not pleaded than he is to recover upon a claim pleaded but not proved.

Appellee finds herself in that position.

---

3. ACCEPTANCE CAN OCCUR ONLY AFTER ABANDONMENT.

Appellant does not deny that it dispatched the salvage tug MAIZIE-C from Honolulu on June 10, 1949, to succor the stranded vessel (R. 49-50), or that on June 11th it executed a formal salvage agreement with King Limited, owner of the tug, by which it committed $1,500 to salvage charges (R. 80-83), or that its agent and the salvor succeeded on June 12th in floating the vessel from the strand, after which the salvor took her under tow to a safe port (R. 52, 130).

Appellant does urge that no tender of abandonment was made by appellee until after these events has tran-

---

[14] *McKinlay v. Morish*, 21 How. 343 (U.S. 1858).

[15] *Sylvan Beach v. Koch*, 140 F. (2d) 852, 861 (C.C.A. 8th 1944).

spired and MISS PHILIPPINE was safely in tow on the high seas.[16] The record of evidence bears out this contention, establishing that appellee first gave notice of abandonment on June 13th (R. 175-176, 188-189, 192-198). Clearly no act of appellant performed prior to that time could be deemed an acceptance of an abandonment which still remained inchoate. The doctrine that any act of the underwriter *in consequence of an abandonment*, which could be justified only under a right derived from it, may be decisive evidence of an acceptance, has no application to acts performed before notice of the abandonment has been communicated to the underwriter.[17]

---

4. NO ACTS OF APPELLANT CONSTITUTED ACCEPTANCE OF ABANDONMENT.

It has already been shown that appellant's expressed attitude throughout its dealing with respect to MISS PHILIPPINE was unequivocal denial of a constructive total loss and refusal to accept her tendered abandonment. Acts of appellant in effecting rescue and salvage of the vessel prior to her abandonment are immaterial to any inquiry whether, by its conduct, appellant recognized and accepted that abandonment. And in any event, any and all acts of appellant "in recovering, saving, and preserving" the insured vessel were expressly protected by the policy's sue-and-labor clauses (R. 7, 8).

---

[16] *See* Brief for Appellant, pp. 29-30, 32-33.

[17] *Richelieu Nav. Co. v. Boston Ins. Co.*, 136 U.S. 408, 433 (1890).

This is *not* a case wherein the underwriter, being authorized by the policy to repair the vessel, made insufficient repairs or withheld possession from the assured for an unreasonable time.[18]

Neither is this a case wherein the underwriter salvaged the vessel and put her in drydock for survey and then, having under the policy the right to repair and the duty to return her to the owner, sank her in her former position without making the repairs or notifying her owners.[19]

This policy neither authorized nor required appellant to repair the vessel (R. 6-9). And appellant neither undertook repairs nor undertook salvage with the intention of making repairs. In saving and preserving MISS PHILIPPINE, appellant acted within the protection of the sue-and-labor clauses and did nothing more than it had authority to do without incurring a disavowed liability.[20]

The court below stated (R. 22, 23), and appellee urges repetitiously in her brief, that appellant's refusal to instruct the salvor on June 13th amounted to an "abandonment at sea." That theory, whatever its significance may be, fails to recognize the situation as disclosed by the evidence. In fact, appellee had on that very day tendered

---

[18] *Cf. Copelin v. Insurance Co.*, 9 Wall. 461 (U.S. 1869).

[19] *Cf. American Merchant Marine Ins. Co. v. Liberty S. & G. Co.*, 282 Fed. 514 (C.C.A. 3d 1922).

[20] *Washburn & Moen Mfg. Co. v. Reliance Ins. Co.*, 179 U.S. 1 (1900);
Richelieu Nav. Co. v. Boston Ins. Co., supra note 17;
Jeffcott v. Aetna Ins. Co., 32 F. Supp. 409 (S.D. N.Y. 1940).

abandonment and been told by appellant that it expected her to salvage the vessel (R. 175-176, 189); the salvor had informed both parties that the vessel was in tow on the high seas, that the $1,500 invested by appellant in salvage was exhausted, and that it wanted further instructions (R. 190-191); and then, in the presence of appellee's attorney, appellant stated it had no further instructions (R. 191-197). Appellant thereby declined to commit itself to further salvage expenses or to exercise any control over the disposition of the vessel.

Nothing could be further removed from reality than to label this refusal to control as an act "inconsistent with the dominion, control and possession of the assured."[21] It was anything but such dominion and control which could be deemed a recognition of the transfer of ownership consequent to abandonment.

The gist of appellee's theory of recovery seems to be that appellant's refusal to spend more than $1,500 for salvage charges, and also its other acts which resulted in the recovery and salvation of the vessel, "were all done without the consent or authority of appellee."[22] But appellee is bound by the terms of her policy, which authorized appellant to recover, save and preserve the property without any risk that its acts might be considered a waiver or acceptance of abandonment. These sue-and-labor provisions authorizing such acts by the insurer are in the public interest, inure to the benefit of

[21]Brief for Appellee, pp. 26-27.
[22]*Id.* p. 27.

both parties to the policy, and will be given liberal effect to protect the underwriter who minimizes a loss.[23]

Any claim by appellee implying that appellant withheld possession of the vessel, infringing upon her right of dominion and control, is wholly without substance. While she stood by and did nothing, the vessel was rescued, towed safely to port, turned upright and tied buoyant at Kaunakakai wharf—all as the result of appellant's effort and expenditure. The vessel was immediately available for her exclusive disposition (R. 94, 104-105).

It ill becomes appellee to complain now that she did not consent to those acts of appellant, or that appellant did not spend enough money on salvage, and to invoke on such grounds the technical doctrine of constructive acceptance of abandonment. On the record, those claims are clearly without merit.

CONCLUSION.

We submit that the policy of insurance, pleadings and proof in this case afford no basis for holding that appellant had, by its conduct, accepted abandonment of the insured vessel. Appellee having admittedly not proved a constructive total loss, she is not entitled on any ground

---

[23] *Washburn & Moen Mfg. Co. v. Reliance Ins. Co.*, *supra* note 20;
Chicago S.S. Lines v. United States Lloyds, *supra* note 4, 2 F. (2d) 767, *aff'd* 12 F. (2d) 733.

to recover on the policy. The decree of the District Court was therefore erroneous and should be reversed, with direction to enter decree for appellant.

Dated, Honolulu, Hawaii,
November 2, 1950.

Respectfully submitted,
THOMAS M. WADDOUPS,
ROBERT E. BROWN,
Proctors for Appellant.

ROBERTSON, CASTLE & ANTHONY,
Of Counsel.